Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF WASHINGTON,
Petitioner,
v.
MARTIN SHAW PANG,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Treaty of Extradition between the United States and Brazil expressly incorporates the doctrine of specialty and provides that the requesting nation may try the extradited individual only for offenses listed in the extradition request. The United States requested the defendant's extradition for four counts of murder and one count of arson. Brazil's extradition decision included only the arson count. Though Brazil has not protested the prosecution of the defendant for murder, the Washington Supreme Court implied a broader specialty doctrine into the treaty and held that this implied doctrine prohibited the State of Washington from prosecuting the defendant for murder. The questions presented are:

1. Whether under an extradition treaty, a defendant has standing to allege a violation of the doctrine of specialty when the surrendering country has not protested the prosecution.

2. Whether under *United States v. Rauscher*, 119 U.S. 407 (1886), a court should imply a rule of specialty contrary to the express specialty provision negotiated by the parties and set forth in the extradition treaty.

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v.

MARTIN SHAW PANG,

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Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

Petitioner State of Washington respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Washington Supreme Court, filed on July 31, 1997 and modified on October 15, 1997.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 132 Wn.2d 852, 940 P.2d 1293 and is reproduced in Appendix A. The opinion was subsequently revised by an Order Changing Opinion on October 15, 1997. *See* App. 103a-104a. The opinion of the King County Superior Court is unreported and is reproduced in Appendix B.

JURISDICTION

The Washington Supreme Court entered its judgment and opinion on July 31, 1997. The court denied the

State of Washington's motion for reconsideration on October 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

TREATY INVOLVED

The Treaty of Extradition Between the United States of America and the United States of Brazil, dated January 13, 1961, is reproduced in Appendix E. 15 U.S.T. 2093, T.I.A.S. No. 5691. Article XXI provides:

> A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request, nor may he be re-extradited by the requesting State to a third country which claims him, unless the surrendering State also agrees. . . .

App. 119a.

STATEMENT OF THE CASE

A. The Warehouse Fire and the Extradition From Brazil

On January 5, 1995, the Seattle Fire Department responded to a fire at the Mary Pang's Food Products warehouse in downtown Seattle, Washington. Four firefighters, Walter Kilgore, Gregory Shoemaker, James Brown, and Randall Terlicker, died fighting the blaze. The building was insured by the parents of defendant Martin Pang. Investigators subsequently discovered that the fire had been deliberately set and that, before the fire, Pang had discussed with numerous friends and associates his desire to burn the warehouse down.

In February, 1995, after a federal warrant was issued for his arrest, Pang fled to Brazil. In March, 1995, the State of Washington charged Pang by information in King County Superior Court with four counts of Felony Murder in the First Degree and one count of Arson in

the First Degree.[1] The underlying felony for each of the Felony Murder counts was Arson in the First Degree.

At the United States' request, Pang was arrested in Rio de Janeiro in March of 1995. After his arrest, Pang confessed to FBI agents that he had set the fire to the warehouse. On May 8, 1995, the United States formally requested that, pursuant to the extradition treaty between the two nations, Brazil extradite Pang back to the United States to face the murder and arson charges.

Article II of the Extradition Treaty between the United States and Brazil requires each country to deliver up persons who have been charged with certain enumerated offenses; among the crimes specifically listed are murder and arson. After extradition, Article XXI of the Treaty prohibits the requesting state from trying the extradited person for any crime not listed in the extradition request.

In Brazil, the Federal Supreme Court decides requests for extradition from a foreign state. On December 18, 1995, the Federal Supreme Court issued its decision on the Pang extradition. In its summary decision, the Court held:

> [T]he Court, by majority vote, granted the requested extradition in part, for the crime of arson in the first degree, resulting in four deaths and the consequences thereof under U.S. law. However, the Court did so without the additional charge[s] of four counts of first-degree murder.

App. 105a.

On February 22, 1996, the United States requested that the Brazilian Ministry of Foreign Affairs provide written authorization to prosecute Pang for both arson and first degree murder. The Ministry responded that it did not have jurisdiction to interpret or establish limits regarding the scope of the Federal Supreme Court's decision. The

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[1] *See* Wash. Rev. Code §§ 9A.32.030(c), 9A.48.020.

United States subsequently moved the Federal Supreme Court to reconsider or clarify its extradition decision; that motion was denied.

On May 21, 1996, President Clinton wrote to Brazilian President Fernando Henrique Cardoso requesting that Brazil provide a statement that it either consented or did not object to the prosecution of Pang for murder. On September 26, 1996, Brazilian Justice Minister Nelson Jobim responded to President Clinton's request and wrote to United States Attorney General Janet Reno about the Pang extradition. He stated that under Brazilian law, the Executive Branch was restricted from commenting on the content or rulings handed down by the Federal Supreme Court. He also wrote that:

> [I]t will be incumbent upon the justice system of the United States of America to establish a suitable punishment for the crime of arson in the first degree, resulting in four deaths and the consequences thereof, under U.S. law. It goes without saying that the precise interpretation of this language, used by the Brazilian court in its decision, and the determination of how it might be best adapted to U.S. law, are for the justice system of your country to decide.

B. The Proceedings Below

Pang was returned to the United States and arraigned on March 8, 1996, in King County Superior Court, on four counts of first degree murder and one count of first degree arson. On November 12, 1996, Pang moved to dismiss and/or sever the murder charges because the Brazilian Supreme Court had denied extradition on those offenses. The King County Superior Court denied Pang's motion, observing that Brazil "has been given every opportunity to object and has not." App. 100a. The court concluded that Pang lacked standing to claim a violation of the extradition treaty, because Brazil had implicitly waived any objection. App. 99a-101a.

After the Superior Court's ruling, Pang's counsel wrote several letters to Brazil's Department of Justice requesting that it protest the Superior Court's decision. On February 26, 1997, Justice Minister Nelson Jobim replied to Pang's attorneys and stated that "the criteria in judging the case, in light of the Treaty of Extradition currently used between the two countries and the decision of the Federal Supreme Court on extradition, are of the exclusive interpretation of the North-American Judicial System, which must apply the norm to the concrete case." To date, Brazil has not protested the State of Washington's prosecution of Pang for murder.

The Washington Supreme Court accepted discretionary review of the Superior Court's ruling, and, on July 31, 1997, in a 5 to 4 decision, held that (i) Pang had standing to object to a violation of the extradition treaty; (ii) Brazil had not waived any possible objection to the prosecution of Pang for murder; and (iii) the doctrine of specialty, as incorporated into the extradition treaty by implication, prohibited the State of Washington from trying Pang for murder. The court held that there is an "implicit rule of specialty" in all treaties, which provides that "an extradited person may be prosecuted only for offenses specified in the order of extradition." App. 64a.

Chief Justice Barbara Durham, writing for the four dissenting justices, argued that the plain language of the treaty permitted the murder prosecutions because those charges were included in the United States' extradition request. "The majority's conclusion is based on a misunderstanding of the specialty doctrine and is inconsistent with the vast weight of authority, which holds that the scope of any specialty limitations on prosecution is determined solely by the language of the applicable treaty." App. 75a. Justice Durham concluded that "rather than furthering the ends of justice, the majority rewards Pang's calculated flight and ensures that neither nation's will is done by immunizing Pang from any liability for the deaths he may have caused." App. 92a-93a.

On October 15, 1997, the Washington Supreme Court denied the State's motion for reconsideration and ordered several changes to its written decision. App. 103a-104a.

REASONS FOR GRANTING THE PETITION

The doctrine of specialty generally provides that an extradited defendant may be tried by the receiving nation only for those offenses charged in the extradition proceedings or for which he or she was delivered up. *United States v. Rauscher*, 119 U.S. 407, 419-20 (1986). This Court last considered the doctrine of specialty over 100 years ago in *Rauscher*. Since that time, the number of extraditions to the United States has risen dramatically, and it has become increasingly common for extradited defendants to move for dismissal of charges based upon an alleged specialty violation. This Court should grant certiorari in order to resolve several outstanding issues concerning the specialty doctrine not addressed in *Rauscher*: (i) whether an extradited defendant has standing to claim a specialty violation when the surrendering nation has made no protest, and (ii) whether a uniform rule of specialty should be implied into all extradition treaties even though all treaties now contain specific, though varying, provisions incorporating the specialty doctrine.

I. THE CIRCUITS ARE IN CONFLICT OVER WHEN AN EXTRADITED PERSON HAS STANDING TO CLAIM A VIOLATION OF THE DOCTRINE OF SPECIALTY.

This Court first addressed the doctrine of specialty in *Rauscher*. The extradition treaty between the United States and Great Britain did not contain an explicit provision incorporating the specialty doctrine, but Great Britain, for years, had insisted that the doctrine was implicit in the treaty. 119 U.S. at 415-16. Rauscher had been extradited from Great Britain on the charge of murder, but was prosecuted for and convicted of a different crime, inflicting cruel and unusual punishment. 119 U.S.

at 409. After reviewing other judicial decisions, the terms of the treaty and other authorities, the Court implied the doctrine into the treaty. 119 U.S. at 416-30.

In *Rauscher*, the Court did not address when an extradited individual has standing to allege a violation of the doctrine of specialty. Since *Rauscher* was decided over 100 years ago, the Court has not discussed the specialty doctrine other than tangentially.[2]

The United States now is party to over 100 extradition treaties.[3] Since the *Rauscher* decision, all contain specific, varying provisions incorporating the specialty doctrine.[4] They generally are silent as to whether they confer any right upon the extradited individual to enforce the terms of the treaty.[5] Beginning in the 1980's, as the number of cases involving extradited defendants increased, a split developed among the federal circuits concerning an extradited defendant's standing to claim a violation of the specialty doctrine.[6]

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[2] *See United States v. Alvarez-Machain*, 504 U.S. 655, 659-660 (1992); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 523-26 (1988); *Johnson v. Browne*, 205 U.S. 309 (1907).

[3] A list of the extradition treaties currently in force is set forth in 18 U.S.C. § 3181 note.

[4] *See* Note, *International Extradition, the Principle of Specialty and Effective Treaty Enforcement*, 76 Minn. Law Rev. 1017, 1027-28 (1992) [hereinafter Note, *International Extradition*].

[5] Note, *Standing for the Doctrine of Specialty in Extradition Treaties: A More Liberal Exposition of Private Rights;* 25 Loy. L.A. L. Rev. 1377, 1396 (1992) [hereinafter Note, *Standing for the Doctrine*].

[6] The Courts of Appeals have openly acknowledged the split of authority on the issue of standing. *See United States v. Saccoccia*, 58 F.3d 754, 767, n.6 (CA1 1995), *cert. denied*, 116 S. Ct. 1322 (1995); *United States v. Puentes*, 50 F.3d 1567, 1572 (CA11 1995), *cert. denied*, 116 S. Ct. 341 (1995); *Leighnor v. Turner*, 884 F.2d 385, 388 (CA8 1989); *United States v. Cuevas*, 847 F.2d 1417, 1426, n.23 (CA9 1988), *cert. denied*, 489 U.S. 1012 (1989). In recent years, this split has attracted the interest of numerous legal com-

The lower courts' decisions fall into two general categories: (1) decisions holding that a defendant has no standing to raise a specialty claim unless the surrendering country protests, i.e., the "no standing without protest" approach, and (2) decisions holding that a defendant has standing to raise a specialty claim unless the surrendering country has waived the claim, i.e., the "standing unless waiver" approach.

The Second, Third, Fifth and Sixth Circuits hold that a defendant has no standing to claim a violation of the doctrine of specialty unless the surrendering nation protests or would protest.[7] "Since the object of the rule is to prevent the United States from violating international obligations, it becomes essential to determine, as best one can, whether the surrendering state would regard the prosecution as a breach." *Fiocconi v. Attorney Gen.*, 462 F.2d 475, 480 (CA2 1972), *cert. denied*, 409 U.S. 1059 (1972).

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mentators calling for some resolution of the issue. *See* Papandrea, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between the Individual and the Sovereign*, 62 U. Chi. L. Rev. 1187, 1196-1202 (1995); Semmelman, *The Doctrine of Specialty in the Federal Courts*, 34 Va. J. Int'l L. 71, 137-43 (1993); Note, *International Extradition*, *supra* note 2, at 1029-39; Note, *Standing for the Doctrine*, *supra* note 3, at 1386-92.

[7] *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (CA4 1997); *United States v. Miro*, 29 F.3d 194, 200, n.5 (CA5 1994); *United States v. Kaufman*, 874 F.2d 243 (CA5 1989); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-84 (CA6 1985), *cert. denied*, 475 U.S. 1016 (1986); *Fiocconi v. Attorney Gen.*, 462 F.2d 475, 480-81 (CA2 1972), *cert. denied*, 409 U.S. 1059 (1972). It appears likely that the Seventh Circuit would also adopt this approach. *See Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (CA7 1990), *cert. denied*, 498 U.S. 878 (1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.") Several district courts have also adopted this position. *See Extradition of Sandhu*, 886 F. Supp. 318, 325 (S.D.N.Y. 1993); *Kaiser v. Rutherford*, 827 F. Supp. 832, 835 (D.D.C. 1993); *Cabrera v. Warden, Metropolitan Correctional Center*, 629 F. Supp. 699 (S.D.N.Y. 1986).

The Eighth, Ninth, Tenth and Eleventh Circuits have held that a defendant has standing to assert a specialty violation without any protest from the surrendering nation.[8] The defendant may raise any objections the extraditing country "might have" made.[9]

The conflict between the circuits on the standing issue has existed for over a decade without resolution. Several circuits have simply avoided or delayed taking a position on the issue of standing and proceeded to address the merits of the specialty claim.[10]

The standing issue will recur with great frequency. In recent decades, the number of extraditions has dramatically increased; between the 1960's and 1987, the number of extradition requests made and received by the United States increased from 20 to 572 per year.[11] As evidenced by the increasing number of Court of Appeals decisions on the standing issue in the 1990's, more and more defendants are moving for dismissal of charges based upon a specialty provision in an extradition treaty.

This case squarely presents the issue of the proper standard to employ in determining whether a defendant may assert a specialty claim. Applying the "standing unless waiver" approach, the Washington Supreme Court held that Pang could raise a specialty claim because the Brazilian Government has not waived any possible objections. Had the court adopted the "no standing without

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[8] *See Puentes*, 50 F.3d at 1572; *United States v. Levy*, 905 F.2d 326, 328, n.1 (CA10 1990), *cert. denied*, 498 U.S. 1049 (1991); *States v. Thirion*, 813 F.2d 146, 151 (CA8 1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (CA9 1986), *cert. denied*, 479 U.S. 1009 (1986).

[9] See *Thirion*, 813 F.2d at 151; *Najohn*, 785 F.2d at 1422.

[10] *See Saccoccia*, 58 F.3d at 767, n.6; *United States v. Lehder-Rivas*, 955 F.2d 1510, 1520, n.7 (CA11 1992), *cert. denied*, 506 U.S. 924 (1992).

[11] Note, *International Extradition*, *supra* note 2, at 1024, n.29.

protest" approach, Pang could not claim a violation of the specialty doctrine, because Brazil repeatedly has refused Pang's requests to protest trial on the murder charges. By granting certiorari, the Court can resolve the issue of a defendant's standing to allege violations of the doctrine of specialty.

II. THE COURT SHOULD HOLD THAT A DEFENDANT HAS NO STANDING UNLESS THE SURRENDERING COUNTRY PROTESTS.

The Court should hold that a defendant may assert a violation of the specialty doctrine only if the surrendering country objects to the pending prosecution. Such a rule is consistent with the purposes that gave birth to and underlie the specialty doctrine. The purpose of the doctrine is to protect the interests of the surrending nation, not the rights of an extradited defendant.

Under international law, an individual who flees to escape prosecution for a crime has no right to demand asylum. *Kerr v. Illinois*, 119 U.S. 436, 442 (1986); *United States v. Riviere*, 924 F.2d 1289, 1300 (CA3 1991). "The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as criminal at the place of asylum, involves no impairment of any legitimate public or private interest." *Factor v. Laubenheimer*, 290 U.S. 276, 298 (1933).

The doctrine of specialty is simply one provision of an extradition treaty entered into by two sovereign nations. "The principle of specialty fundamentally bears on treaty obligations between the states; the principle operates to ensure that the receiving state does not abuse the extradition processes of the extraditing state." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 525 (1988). As Judge Henry J. Friendly observed, "[a]s a matter of international law, the principle of specialty has been viewed as a privilege of the asylum state, designed to protect its

dignity and interests, rather than a right accruing to the accused." *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (CA2 1973), *cert. dismissed*, 414 U.S. 884 (1973).

Although the specialty doctrine may benefit an extradited defendant, it does not exist for that purpose. The circuit courts uniformly have held that a defendant holds the right to assert a specialty claim only at the sufferance of the surrendering nation.[12] Moreover, the asylum state may waive any objection to a violation of the specialty provision asserted by a defendant.[13] A country may also act outside the terms of the treaty and surrender a de- Even though a strict application of the doctrine presumably would bar the prosecution of any charges other than those listed in the extradition request or order, the courts have found that the surrendering state would not object when the new charges and the extradited charges are similar,[15] or when the charges appear to have been inadvertently omitted from the extradition order.[16]

It is appropriate to limit a defendant's derivative right to raise a specialty claim to circumstances where the surrendering nation would be offended by the proposed prosecution. When the doctrine of specialty is applied to prohibit prosecution on properly charged criminal offenses, the results can be harsh: the receiving country is prevented from holding the fugitive responsible for the full extent of his criminal actions, and the suspect is rewarded for eluding authorities and fleeing to another nation.

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[12] *See Puentes*, 50 F.3d at 1575; *Riviere*, 924 F.2d at 1297-01; *United States v. Diwan*, 864 F.2d 715, 721 (CA11 1989), *cert. denied*, 492 U.S. 921 (1989).

[13] *See* cases cited *supra* note 12.

[14] *Riviere*, 924 F.2d at 1301; *Najohn*, 785 F.2d at 1422-23.

[15] *United States v. Andonian*, 29 F.3d 1482, 1435-37 (CA9 1994). *cert. denied*, 513 U.S. 1128 (1995).

[16] *Lehder-Rivas*, 955 F.2d at 1520; *Levy*, 905 F.2d at 329; *United States v. Jetter*, 722 F.2d 371, 373 (CA8 1983).

Moreover, it places the receiving nation in a worse position than if it had avoided the extradition process and, instead, forcibly abducted the suspect and transported him back to the United States. *See United States v. Alvarez-Machain*, 505 U.S. 655, 699-70. Extradition treaties should be interpreted in a manner that discourages criminal suspects from fleeing their native countries and encourages nations to rely upon the extradition processes set forth in the treaty.

In this case, the real and practical effect of the Washington Supreme Court's decision is to reward Pang for his decision to flee to Brazil. Pang, a United States citizen, fled to Brazil in order to avoid being held accountable for his crimes. If the Washington Supreme Court's decision is permitted to stand, he will have accomplished this goal even though the Brazilian government has not objected to prosecution on the murder charges.

The Court should establish that an extradited defendant may raise a specialty claim only if the surrendering state protests the prosecution. In this case, Pang repeatedly lobbied the Brazilian Government to issue a formal written protest of the King County Superior Court's decision to permit prosecution on the murder charges. Brazil made no protest. Pang should not be heard to complain when Brazil has not.

III. THE EXPRESS SPECIALTY PROVISION NEGOTIATED BY THE PARTIES CONTROLS THEIR RIGHTS AND OBLIGATIONS; *RAUSCHER* DOES NOT REQUIRE THE IMPLICATION OF A RULE OF SPECIALTY DIFFERENT FROM THAT SET FORTH IN THE TREATY.

In *Rauscher*, this Court considered whether the doctrine of specialty was incorporated into the treaty between the United States and Great Britain in the face of the treaty's silence on the issue. The treaty between the United States and Brazil is not silent; even the Wash-

ington Supreme Court recognized, there is a specific article addressing the doctrine of specialty. Nevertheless, by applying the holding of *Rauscher* without considering its reasoning, the Washington Supreme Court implied a rule of specialty different from that agreed to by the parties and set forth in the treaty. That interpretation of the extradition treaty is contrary to the treaty's plain language, is inconsistent with this Court's standards of treaty interpretation and conflicts with numerous decisions of the United States Courts of Appeals.

In its decision, the Washington Supreme Court merged two different concepts of extradition law, the doctrine of specialty and the doctrine of dual criminality, and held that the specialty provision in the treaty "requires that the crime must be enumerated in the treaty and must satisfy the doctrine of dual criminality." App. 63a-64a. Although these two doctrines may be related in this way in other extradition treaties, the United States-Brazil extradition treaty does not intertwine these two separate doctrines.

Dual criminality applies *prior* to extradition. Under this doctrine, a crime is extraditable if the defendant's conduct is generally considered criminal in both nations. *Collins v. Loisel*, 259 U.S. 309, 312 (1922).[17] Unless the doctrine of dual criminality is specifically incorporated into a treaty, it will not be implied. *Factor v. Laubenheimer*, 290 U.S. 276, 292-94 (1933). Rather than rely upon a dual criminality analysis, the parties to an extradition treaty may simply list certain offenses as extraditable regardless of whether they are crimes in both nations. *Factor*, 290 U.S. at 300.[18]

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[17] *See also Saccoccia*, 58 F.3d at 766; *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1404 (CA9 1988), *cert. denied*, 490 U.S. 1106 (1989).

[18] *See also Matter of Assarsson*, 635 F.2d 1237, 1245 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); *Gallina v. Fraser*, 278 F.2d 77, 79 (2nd Cir. 1960), *cert. denied*, 364 U.S. 851 (1960).

The doctrine of specialty applies *after* extradition; it limits the requesting nation's jurisdiction to prosecute an extradited individual. It prevents the requesting nation from misleading the surrendering nation as to the reasons behind the request for extradition. *Van Cauwenberghe*, 486 U.S. at 525. Unlike other extradition treaties, the treaty in this case does not limit the prosecution to only those offenses for which extradition was granted. The specialty provision contained in Article XXI of the Treaty of Extradition between the United States and Brazil provides:

> A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that *which gave rise to the request*, nor may he be re-extradited by the requesting State to a third country which claims him, unless the surrendering State also agrees or unless the person extradited, having been set at liberty within the requesting State, remains voluntarily in the requesting State for more than 30 days from the date on which he was released.

App. at 119a (emphasis added). This provision prevents the requesting state from prosecuting an extradited defendant for an offense not listed in the extradition request. It prohibits what occurred in *Rauscher* where the government prosecuted the defendant for an offense different from the one presented at the extradition hearing. Under the plain language of the extradition treaty, the State of Washington can prosecute Pang for the four counts of murder because those offenses were listed in the extradition request.

On the several occasions that this Court has construed claims made under extradition treaties, it appropriately has focused on the precise language of the applicable treaty. In *Factor v. Laubenheimer*, the defendant challenged his extradition to Great Britain, claiming that under the doctrine of dual criminality, he could only be extra-

dited for an offense that was a crime in both the surrendering and the receiving countries. 290 U.S. at 286-87. In rejecting the defendant's claim, the Court observed that the treaty specifically required that some offenses satisfy a dual criminality requirement, but that it imposed no such requirement for the offense at issue. 290 U.S. at 289-94. The Court held that the language in the treaty controlled the issue:

> [T]he principles of international law recognize no right to extradition apart from treaty . . . . [T]he legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty . . . . To determine the nature and extent of the right we must look to the treaty which created it.

290 U.S. at 287 (emphasis added).

Similarly, in *Valentine v. United States*, 299 U.S. 5 (1936), the Court again focused on the language of the treaty, finding significant differences between the extradition treaty at issue and other treaties. At issue was whether the United States government had the authority to extradite a United States citizen to France. The language of the treaty provided that "[n]either of the contracting Parties shall be bound to deliver up its own citizens." 299 U.S. at 10. The Court, citing clauses in other extradition treaties that specifically provided the Government with the authority to extradite its own citizens, held that the treaty did not confer the authority to extradite United States citizens to France. "We must assume that the representatives of the United States had these clauses before them when they negotiated the treaty with France and that the omission was deliberate." 299 U.S. at 13.

In this case, the extradition treaty between the United States and Brazil is quite clear as to what it prohibits: the requesting nation may not prosecute the extradited individual for any offense other than that *listed in the extradition request*. It would have been easy for the

parties to have worded this section differently had they so desired; specialty clauses in many extradition treaties expressly limit the requesting nation to prosecuting the defendant for crimes for which extradition is granted.[19] As this Court recognized in *Valentine*, the parties' decision to use different language is significant; it must be assumed that, when negotiating this extradition treaty, the parties were familiar with the standard clause prohibiting prosecution for any crimes other than those permitted in the extradition order, and that they intentionally chose to use different language.

The Washington Supreme Court cited 18 U.S.C. § 3192 as support for implying a doctrine of specialty different from that set forth in the treaty. Except for *Rauscher*, where the extradition treaty between the United States and Great Britain was *silent* as to whether the doctrine of specialty was incorporated into the treaty, no other court has relied upon this statute to imply additional terms into a treaty. The statute simply provides the President of the United States with authority to transport and safekeep an extradited individual; in this case, the President's authority to safekeep the defendant has not been invoked. Moreover, to the extent that the statute is inconsistent with the plain language of the extradition treaty, the treaty's terms would prevail because it is last in time.[20] *Cook v. United States*, 288 U.S. 102, 118-19 (1933); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

The Washington Supreme Court's interpretation of the extradition treaty is inconsistent with several decisions by the United States Courts of Appeals that have focused on the language set forth in the treaty when assessing an

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[19] *See Saccoccia*, 58 F.3d at 766 (citing extradition treaty between the United States and Switzerland); *Andonian*, 29 F.3d at 1433 (Uruguay); *Miro*, 29 F.3d at 199 (Spain); *Leighnor*, 884 F.2d at 388-89 (West Germany).

[20] The statute was enacted on June 25, 1948, while the extradition treaty went into effect on December 17, 1964.

alleged violation of the specialty doctrine. For example, in *Fiocconi v. Attorney General,* 462 F.2d 475 (CA2 1972), *cert. denied,* 409 U.S. 1059 (1972), the court relied upon the precise language of the specialty provision in the extradition treaty between the United States and Italy and upheld the defendant's convictions for offenses not included in the United States' extradition request or in Italy's extradition order. The specialty provision in the treaty prohibited prosecution only for crimes that occurred prior to the crimes listed in the extradition request. Though the offenses at issue occurred before the extradition request was made, they occurred after the offenses set forth in the request. Judge Friendly, writing for the court, observed that had the parties to the treaty wished to prohibit prosecution for all offenses that occurred prior to the extradition request, "they could have accomplished this by adopting one of the standard clauses to that end." 462 F.2d at 481.

Similarly, in *United States v. Sensi,* 879 F.2d 888 (CADC 1989), the court focused on the precise language of the specialty provision in upholding convictions for offenses not listed in the extradition order. The specialty provision in the extradiiton treaty provided that "[a] person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted. . . ." 879 F.2d at 895. The court held that the prosecution did not violate the treaty's specialty provision because the charges were based upon the same underlying facts as the offenses set forth in the extradition order.[21]

In this case, under the plain language of the extradition treaty, Brazil had the power to grant extradition for all or

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[21] *See also United States v. Khan,* 993 F.2d 1368 (CA9 1993) (the Ninth Circuit distinguished its holding from *Sensi* based upon differences in the wording of the treaty's specialty provision).

none of the charges listed in the United States' request.[22] Article XXI of the extradition treaty allows the State of Washington to prosecute Pang for any offense included in the extradition request, regardless of whether Brazil based its decision to extradite on that particular offense. The murder charges were listed in that request. This Court should grant certiorari to correct the Washington Supreme Court's erroneous interpretation of the treaty and application of the doctrine of specialty.

IV. THE WASHINGTON SUPREME COURT'S DECISION IS SUBJECT TO REVIEW BY THIS COURT.

This Court has authority to review the Washington Supreme Court's decision ordering the dismissal of the murder charges under 28 U.S.C. § 1257(a). That statute allows the Court to review final judgments or decrees rendered by the highest court of a State where any right, privilege, or immunity is claimed under a treaty of the United States.

The Washington Supreme Court is the highest court in the State of Washington, and its decision involves a claim of right under the extradition treaty between the United States and Brazil. The court's decision is final as to the four murder counts; the court has considered and denied the State's motion for reconsideration.[23]

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[22] In attempting to grant partial extradition, the justices of the Federal Supreme Court apparently did not consider the specialty provision in the extradition treaty; none of the opinions refer to the treaty provision. Even if the opinions could be construed as an interpretation of the treaty's specialty provision, this Court is not bound by a foreign court's interpretation of a treaty. *Ex Parte Charleton*, 185 F. 880 (1911), *aff'd*, *Charleton v. Kelly*, 229 U.S. 447 (1912).

[23] This Court has recognized that appellate review of a lower court's decision disposing of some, but not all of the claims, is appropriate when the decision has been certified as final under Federal Rule of Civil Procedure 54(b). *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980); *see also* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4010, p. 198

Moreover, the Washington Supreme Court's decision is reviewable under the collateral order doctrine because it (i) conclusively determines a disputed question, (ii) resolves an important issue completely separate from the merits of the action, and (iii) may be effectively unreviewable if the appeal is postponed until after trial on the arson count. *Construction Laborers v. Curry*, 371 U.S. 542, 549-50 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963).[24]

The federal issues raised in this petition may become moot if the State must wait until after the arson trial and after Pang has exhausted his appeals through the state appellate system before petitioning this Court for review of the Washington Supreme Court's decision. Assuming credit for good time, Pang has already served the high end of a standard range sentence for first degree arson.[25] Because Pang's appeal of a conviction and sentence after trial on the arson count could be lengthy, even if the trial court imposes an exceptional sentence, he could be released before this Court can again review the issues presented in this petition.[26] Once he is released, it is

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(2nd Ed. 1996). While Washington's court rules do not allow an appellate court to certify its decisions as final, the decision in this case on murder charges clearly is final. *See* Washington Rule of Appellate Procedure 2.2(d), Washington Civil Rule 54(b).

[24] Similarly, this Court has held that it will consider a decision as final when "the federal claim has been finally decided, with further proceedings on the merits in the state court to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975).

[25] Pang's standard sentence range on the first degree arson count is 21 to 27 months confinement. Wash. Rev. Code § 9.94A.310, 9.94A.320. Assuming credit for good time, Wash. Rev. Code § 9.94A.150(1), Pang has served the high-end of this sentence; he has been in custody in the State of Washington since March 1, 1996.

[26] In Washington, the trial court may impose an exceptional sentence above the standard range when there are substantial and

highly unlikely that Pang will remain in the United States. Under Article XXI of the extradition treaty, once Pang is released from custody, he *must* leave the United States in 30 days or he can be prosecuted on the murder charges. Accordingly, given Pang's sentence range and the likelihood that he will leave the country after his release, the issues presented in this petition could, as a practical matter, become moot if the court postpones consideration of the petition until after the arson trial.

In addition, if the State proceeds to try Pang on only the arson count, he will likely argue that the Double Jeopardy Clause bars a second trial on the felony murder counts. *See Brown v. Ohio*, 432 U.S. 161, 167 (1977); *Harris v. Oklahoma*, 433 U.S. 682 (1977). While several decisions from this Court would support the State's position that a subsequent murder trial would not run afoul of the Clause, there is no case directly on point, and, therefore, the danger remains that a court would hold that the State of Washington is barred from trying Pang for murder after an arson trial. *Jeffers v. United States*, 432 U.S. 137 (1977); *United States v. Scott*, 437 U.S. 82 (1982).

Finally, the policy of 28 U.S.C. § 1257 against fragmenting and prolonging litigation would be furthered by review prior to the arson trial. *Curry*, 371 U.S. at 550. Because the arson count involves the same evidence as the murder counts, judicial economy and the effective use of the resources of both parties will be furthered by conducting one trial on all counts.

Accordingly, this Court has authority under 28 U.S.C. § 1257(a) to accept review of the Washington Supreme Court's decision in *State of Washington v. Pang*.

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compelling reasons and certain statutory criteria are met. Wash. Rev. Code §§ 9.94A.120(2), 9.94A.390. Three justices of the Washington Supreme Court have stated, in *dicta*, that an exceptional sentence would not be appropriate in this case. App. 90a-92a. The majority decision, while referencing the exceptional sentence statute, did not offer an opinion one way or another. App. 50a-51a.

CONCLUSION

Over 100 years have passed since this Court's decision in *Rauscher*. Since that time, the process of extradition has become more common and more litigious. It is time for this Court to resolve several outstanding issues not addressed in *Rauscher*. The Court should resolve the split among the circuits and hold that an extradited defendant has standing to claim a specialty violation only if the surrendering country protests. Moreover, this Court should hold that a treaty's specific specialty provisions govern the rights and obligations of the parties to the treaty.

For these reasons, this Court should grant the Petition for Writ of Certiorari and reverse the decision of the Washington Supreme Court.

Respectfully submitted,

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Deputy Prosecuting Attorney
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APPENDICES

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Number 64786-1
En Banc
Filed Jul. 31, 1997

STATE OF WASHINGTON,
Respondent

v.

MARTIN SHAW PANG,
Petitioner

SMITH, J.—Petitioner Martin Shaw Pang seeks review of a King County Superior Court decision which denied his motion to dismiss or sever four counts of murder in the first degree from one count to arson in the first degree based upon his claim that the Federal Supreme Court of Brazil approved his extradition from that country for prosecution in the State of Washington only for the crime of arson in the first degree. We reverse.

QUESTION PRESENTED

The basic question in this case is whether the State of Washington may prosecute Petitioner Martin Shaw Pang for four counts of murder in the first degree and one count of arson in the first degree when the Federal Supreme Court of Brazil, ruling on the State's petition for extradition for prosecution in the State of Washington "for the

crime of arson in the first degree, resulting in four deaths . . . . without the additional charge of four counts of first degree murder." To answer the basic question, we must answer these additional questions:

(1) Does Petitioner Pang have standing to object to violation by the State of Washington of the terms of the order on extradition issued by the Federal Supreme Court of Brazil?

(2) Did the United States of Brazil explicitly or implicitly waive any objection it could have made to prosecution by the State of Washington of Petitioner Pang for murder in the first degree contrary to the specific terms of the extradition order issued by the Federal Supreme Court of Brazil?

(3) Does the "specialty doctrine" in international extradition law prohibit the State of Washington from prosecuting Petitioner Pang for crimes specifically excluded in the extradition order?

(4) Does the Extradition Treaty between the United States of America and the United States of Brazil prohibit the State of Washington from prosecuting Petitioner Pang for crimes not authorized in the extradition order?

(5) Is the State of Washington obligated to follow the decision of the Federal Supreme Court of Brazil which ruled that, as a condition for extraditing Petitioner Pang to the State, he can be prosecuted only "for the crime of arson in the first degree resulting in four deaths . . . without the additional charge of four counts of first degree murder"?

STATEMENT OF FACTS

On January 5, 1995, four firefighters died while fighting a fire at the Mary Pang Products, Inc. warehouse at 811 Seventh Avenue South in Seattle, Washington.[1] Fire in-

[1] *See* Certification for Determination of Probable Cause, Clerk's Papers at 4.

vestigators later determined the fire had been deliberately set. Martin Shaw Pang became a suspect. A fugitive warrant was issued for his arrest.[2] On March 3, 1995 the King County Prosecuting Attorney by Information charged Petitioner Pang with four counts of murder in the first degree as follows:

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse MARTIN S. PANG of the crime of Murder in the First Degree, committed as follows:

That the defendant MARTIN S. PANG, together with another, in King County, Washington on or about January 5, 1995, while committing and attempting to commit the crime of Arson in the First Degree, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the death of Lieutenant Walter Kilgore, a human being who was not a participant in the crime, and who died on or about January 5, 1995;

Contrary to RCW 9A.32.030(1)(C), and against the peace and dignity of the State of Washington.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse MARTIN S. PANG of the crime of Murder in the First Degree, a crime of the same or similar character as another crime charged herein, and committed as follows:

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[2] *See* Warrant for Arrest, United States District Court Case Number 95-38m, signed by Judicial Officer David E. Wilson on February 3, 1995; *see also* Arrest Warrant, King County Superior Court Cause Number 95-1-00473-0, signed by Deputy Clerk Bill Stream. The dateline on the warrant states "Witness my hand and Seal this March 3, 1995 day of January, 1995."

That the defendant MARTIN S. PANG, together with another, in King County, Washington on or about January 5, 1995, while committing and attempting to commit the crime of Arson in the First Degree, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the death of Lieutenant Gregory A. Shoemaker, a human being who was not a participant in the crime, and who died on or about January 5, 1995;

Contrary to RCW 9A.32.030(1)(C), and against the peace and dignity of the State of Washington.

COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse MARTIN S. PANG of the crime of Murder in the First Degree, a crime of the same or similar character as another crime charged herein, and committed as follows:

That the defendant MARTIN S. PANG, together with another, in King County, Washington on or about January 5, 1995, while committing and attempting to commit the crime of Arson in the First Degree, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the death of Firefighter James T. Brown, a human being who was not a participant in the crime, and who died on or about January 5, 1995;

Contrary to RCW 9A.32.030(1)(C), and against the peace and dignity of the State of Washington.

COUNT IV

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse MARTIN S. PANG of the crime of Murder in the First Degree, a crime of the same or similar character as another crime charged herein, and committed as follows:

That the defendant MARTIN S. PANG, together with another, in King County, Washington on or about January 5, 1995, while committing and attempting to commit the crime of Arson in the First Degree, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the death of Firefighter Randall R. Terlicker, a human being who was not a participant in the crime, and who died on or about January 5, 1995;

Contrary to RCW 9A.32.030(1)(C), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney
By: [*s*] *Marilyn B. Brenneman*
MARILYN B. BRENNEMAN
WSBA #91002 [sic]
Senior Deputy Prosecuting Attorney

By: [*s*] *Timothy A. Bradshaw*
TIMOTHY BRADSHAW
WSBA #91002 [sic]
Senior Deputy Prosecuting Attorney[3]

A Certification for Determination of Probable Cause was attached to the Information.[4]

On March 16, 1995, Petitioner Martin Shaw Pang was arrested in Rio de Janeiro, Brazil.[5] The following day the Prosecuting Attorney of King County by amended information added a charge of arson in the first degree. The Amended information, after repeating the four counts of murder in the first degree, then stated:

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[3] Clerk's Papers at 1-3.

[4] *See* Clerk's Papers at 4-8.

[5] *See* Record of Surrender of Person Being Extradited, Number 02/96, Clerk's Papers at 363.

COUNT V

And I Norm Maleng, Prosecuting Attorney aforesaid further do accuse MARTIN S. PANG of the crime of Arson in the First Degree, a crime of the same or similar character and based on a series of acts connected together with another crime charged herein, which crimes were part of a common scheme or plan, and which crimes were so closely connected in respect with time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant MARTIN S. PANG in King County, Washington on or about January 5, 1995, did knowingly and maliciously cause a fire or explosion located at 811 Seventh Avenue South (the Mary Pang Warehouse), Seattle, which was manifestly dangerous to any human life, including firemen;

Contrary to RCW 9A.48.020(1)(a), and against the peace and dignity of the State of Washington.[6]

In July 1995 the United States of America requested the United States of Brazil to extradite Petitioner Pang to the State of Washington for trial on four counts of murder in the first degree and one count of arson in the first degree.[7] The Affidavit in Support of Request for Extradition states:

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[6] Amended Information, Clerk's Papers at 9-11.

[7] *See* Affidavit in Support of Request for Extradition, King County Cause Number 95-1-00473-0.

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, MARILYN B. BRENNEMAN, being duly sworn, hereby depose and say:

1. I am a citizen of the United States and a resident of the State of Washington.

2. I have been engaged in the practice of law in the State of Washington since 1980.

3. Since May 1, 1980 I have been employed by the King County Prosecuting Attorney's Office as a Deputy Prosecuting Attorney. I was appointed Senior Deputy Prosecuting Attorney on January 2, 1985. My duties are to prosecute persons charged with criminal violations of the laws of the State of Washington. In the course of such prosecutions, I have become knowledgeable about the state criminal statutes and case law, including those related to the crime of Murder in the First Degree and Arson in the First Degree. I am responsible for prosecuting the case of *State of Washington vs. Martin Shaw Pang*, King County Superior Court Cause Number 95-1-00473-0. I am therefore familiar with the evidence and charges in this case and the contents of the relevant files of the King County Superior Court and the Office of the King County Prosecuting Attorney.

4. On March 3, 1995, an Information was filed in King County Superior Court charging the defendant with the crimes of Murder in the First Degree, Counts I, II, III, and IV, Class "A" Felonies, carrying the potential penalty of life imprisonment. On March 17, 1995, an Amended Information was filed in King County Superior Court adding the charge of Arson in the First Degree, Count V, also a Class "A" Felony, carrying the potential penalty of life imprisonment.

5. The statutes cited in the Information and Amended Information are Revised Code of Washington 9A.32.030(1)(C) and 9A.48.020(1)(a). These statutes are as follows:

9A.32.030. Murder in the first degree.

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He commits or attempts to commit the crime of either (1) robbery, in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first, and (5) kidnapping, in the first or second degree, and; in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily

capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.

9A.48.020. Arson in the first degree.

(1) *A person is guilty of arson in the first degree if he knowingly and maliciously*:

(a) *Causes a fire or explosion which is manifestly dangerous to any human life, including firemen;* or

(b) Causes a fire or explosion which damages a dwelling; or

(c) Causes a fire or explosion in any building which there shall be at the time a human being who is not a participant in the crime; or

(d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

(2) *Arson in the first degree is a class A felony.*

9A.20.021. Maximum sentences for crimes committed July 1, 1984, and after

(1) Felony. No person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) *For a Class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;*

(b) For a class B felony, by confinement in a state correctional institution or a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by the imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

6. Violations of these statutes are felonies under Washington state law. These statutes were the duly

enacted laws of the State of Washington at the time the offenses were committed, at the time the Informations were filed, and are now in full force.

7. The Statute of Limitations on prosecuting these offenses is Revised Code of Washington 9A.04.080 which states as follows:

> *Prosecutions for the offenses of murder, and arson where death ensues, may be commenced at any period after the commission of the offense,* for offenses the punishment of which may be imprisonment in a state correctional institution, committed by any public officer in connection with the duties of his office or constituting a breach of his public duty or a violation of his oath of office, and arson where death does not ensue, within ten years after their commission; for violations of RCW 9A.44.070, 9A.44.100 (1)(b), within seven years after their commission; for violation of RCW 9A.82.060 or 9A.82.080, within seven years after their commission; for bigamy, within three years of the time specified in RCW 9A.64.010; for all other offenses the punishment of which may be imprisonment in the state correctional institution, within three years after their commission; two years for gross misdemeanors, and for all other offenses, within one year after their commission: Provided, That any length of time during which the party charged was not usually and publicly resident within this state shall not be reckoned within the one, two, three, five, seven, and ten years respectively: And further provided, That where an indictment has been found, or complaint or an information filed, within the time limited for the commencement of a criminal action, if the indictment, complaint or information be set aside.

8. I have reviewed the facts of these offenses and attest that the allegations in the offenses are not time barred.

9. The Information charges that the defendant Martin Pang, together with another, in King County, Washington on or about January 5, 1995, while committing or attempting to commit the crime of Arson in the First Degree, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the deaths of Lieutenant Walter Kilgore, Lieutenant Gregory A. Shoemaker, Firefighter James T. Brown, and Firefighter Randall R. Terlicker.

10. According to the Certification for Determination of Probable Cause filed in this case the Seattle Fire Department responded to a fire on January 5, 1995, at the Mary Pang Products warehouse in Seattle, King County, Washington. While attempting to extinguish the fire, several firefighters entered the first floor of the engulfed warehouse. Without warning, the floor collapsed, dropping the firefighters to the sub-basement. Some of the firefighters were able to escape the building—four were not. Lieutenant Walter D. Kilgore, Lieutenant Gregory A. Shoemaker, Firefighter James T. Brown, and Firefighter Randall R. Terlicker died in the fire. The King County Medical Examiner has determined that Lieutenant Shoemaker died from smoke inhalation, and the other three died from suffocation.

On December 13, 1994, Special Agent Sheryl Bishop of the United States Bureau of Alcohol, Tobacco and Firearms ("ATF") was contacted by a citizen/witness who told her that Mary Pang's business, located in the warehouse, was in decline, and that the warehouse was to be "torched" sometime between December 16, 1994 and December 18, 1994.

On December 14, 1994, [Agent] Bishop met with another witness who stated that on several occasions in the month prior to December 14, 1994, the defendant told the witness that the warehouse was going to burn down and advised the witness to get personal items out of the warehouse. On other occasions during the month, the defendant told the witness how the warehouse would be burned down. His scenarios of how it would happen, which the witness diagrammed for [Agent] Bishop, almost exactly described how the fire actually occurred.

On another occasion, in the month prior to the fire, the defendant spoke with yet another witness and cryptically suggested the witness remove personal items from the warehouse. That witness also helped the defendant remove the defendant's personal items from the warehouse and transport them to storage lockers that he had rented on November 11, 1994.

On January 21, 1995, a search warrant was served on the defendant's storage lockers. Inside the lockers, investigators found many personal items belonging to the defendant, including photographs, trophies and awards, family mementos, and financial records. The investigators, based on their training and experience, indicate that persons who intend to burn down their homes or businesses often remove items which cannot be replaced, such as photographs and personal mementos.

In December 1994, the defendant took a close friend and confident to the warehouse. The defendant told the witness that the business (Mary Pang's Food Products, Inc.) had lost major clients and was not doing well. He complained that his parents were old and feeble, yet would not sell the business. He went on to tell the witness that the warehouse would

burn down in the next month, and that it would look like transients set the fire.

Yet another witness and the defendant have been friends for about six years. During the summer of 1994, the defendant told the witness that he would like to have the business burn, and that it would go up like a tinderbox. The defendant also said that he thought about doing it. The defendant also indicated to the witness that if the business burned down "it would kill my parents."

On numerous other occasions over the last six years, the defendant has told friends of his that the warehouse would be burned down. These friends have detailed the defendant's statements in their statements given to investigators. Several witnesses have given detailed, independent statements that the defendant asked them to burn the Mary Pang warehouse, as recently as last year.

During conversations with witnesses immediately after the fire, the defendant told them how a person he described as a transient must have lighted the fire in the warehouse. The defendant's description of how the fire must have been lighted describes how the fire actually occurred and was made *prior* to the expert's determination that the fire had been deliberately set.

After the fire, the defendant told a witness his scenarios of how the fire must have been lighted. The witness then gave the information to homicide investigators. The fire investigators assigned to identify the cause of the fire had just begun sifting the remains of the business. They did not reach, or announce, their conclusions as to how the fire started until several days *after* the defendant described his scenarios of how the fire must have been lighted. The fire investi-

gators were not told by homicide investigators about the scenarios that the defendant described to the witness.

The day after the fire a different witness had a conversation with the defendant in which the defendant asked the witness if a transient had started the fire at the warehouse would it be considered homicide? The defendant also attempted to throw suspicions on his ex-wife Rise Pang and her current husband, Joseph. The witness noticed throughout their conversation that the defendant appeared very nervous and worrried about criminal charges.

The defendant later telephoned this witness and said that he had been "framed" for the fire and was going to take a "long vacation". The defendant began crying, and told the witness that he (defendant) would never see his friends again. The defendant continued to claim that he had been set up by Joseph, and then said to the witness, in a very strained voice, "Nobody was supposed to get hurt, the building was just supposed to burn down."

The day after the fire, the ATF National Response Team, in conjunction with the Seattle Fire Department's Fire Investigation Unit, began investigating what caused the warehouse fire. The ATF National Response Team is composed of ATF agents who are Certified Fire Investigators. They have become Certified Fire Investigators by completing hundreds of hours of training in determining the cause and origin of fires. Each Certified Fire Investigator has personally investigated, in order to determine the cause and origin of fires, over one hundred fire scenes.

Based upon the investigators' examination of the warehouse fire scene, including burn patterns, liquids and physical evidence, it has been determined that this fire was deliberately set.

The investigators also learned that the arsonist(s) entered the basement area either by using a key or entering a code into the alarm keypad. Firefighters who were first on the scene found that all exteriors [sic] doors not secured by the keypad were locked.

Once inside the pallets area where the fire was set, the investigators found that the interior door leads to an exterior door which also does not have a keypad. This interior door's padlock had been pried off, as if to look like the fire-setter had entered the pallet area through the un-alarmed doors. Additionally, a gasoline can which did not belong to the warehouse was found in the room between these two doors. However, a closer examination showed that the pry marks on the interior door were made from the inside, not the outside, as someone gaining entry through un-alarmed doors from the outside would do. And, as stated above, this mirrors the defendant's statements to witnesses about how a transient was responsible for the fire that burned the warehouse.

In addition, the investigators found that the person who lit this fire worked rapidly. The last person to leave the warehouse basement reports leaving at approximately 6:30 p.m. He saw nothing to indicate a fire. A witness whose band rented space in the warehouse basement, entered the basement shortly before 7:00 p.m. and saw thick smoke. He removed some items from his space, then ran to a telephone booth to call 911. When fire units arrived shortly thereafter, the basement area was fully engulfed in flames. The investigators estimate, based on training and experience, that it took approximately twenty minutes from the time this fire was lit to the time the basement was fully engulfed. This indicates that the arsonist was probably familiar with the warehouse and the occupants' schedules.

The investigators have interviewed dozens of defendant's friends and business associates. Through these interviews the investigators have learned that the defendant has, for the most part, been supported by his parents. Other than a time spent working for his parent's business, the defendant has been frequently unemployed. His parents paid for defendant's short-lived auto racing career, and were helping support him while he pursued an acting career. They gave him gifts of money on all major holidays, paid for his cars; paid for his house and made his child support payments. The defendant had access to, and used checks and credit cards belonging to the business.

Additionally, as described above, the once-successful business, in the last several years, had been failing. Several major accounts, such as Safeway Stores, had been lost. Suppliers indicate that checks written on company accounts, some for as little as $150 would bounce. When that happened the suppliers would have to contact the defendant's parents, who would provide a personal check to cover the amounts owed. The defendant repeatedly expressed to friends and associates his frustration with both the business's decline as well as his parents' continual refusal to sell it or relinquish control to him. The defendant's parents have two children, the defendant and his sister Marlys. Marlys is estranged from the family and has not spoken with them for many years. Harry and Mary Pang, both in their 70's, have no life insurance, their policy having recently lapsed. However, the business, although failing, was well insured. Additionally, the defendant had expressed to various friends over years his plans to use the warehouse property, valued at over $400,000 for his own business.

According to statements made by the defendant to numerous witnesses, he fled the state to avoid prose-

cution in this matter. One witness has given a statement that the defendant was researching countries without extradition treaties with the United States.

11. On March 3, 1995, the defendant was charged in the above King County Superior Court cause with the crimes of Murder in the First Degree, Counts I, II, III, and IV, and a warrant was issued for his arrest setting bail in the amount of $5,000,000.00. Martin Pang is identified as an Asian male; Date of Birth: November 12, 1955; Place of Birth: Hong Kong; Citizenship: United States citizen; Height: 6′0″; Weight 175 lbs [sic]; Black hair; Brown eyes; Scar below his throat.

12. On March 16, 1995, the defendant was arrested in Rio de Janeiro, Brazil, and is currently being held in that jurisdiction pending extradition proceedings. On March 17, 1995, an Amended Information was filed in the above cause adding an additional charge of Arson in the First Degree, Count V.

13. The defendant fled the United States to avoid prosecution and was arrested by Brazilian authorities in Rio De [sic] Janeiro on March 16, 1995. Two agents from the United States Federal Bureau of Investigation accompanied Brazilian authorities during the arrest. The defendant immediately initiated conversation with Special Agent Schoenlein enroute to the Brazilian police station. Agent Schoenlein answered questions that defendant had about extradition and the defendant then initiated conversation about the arson of Mary Pang's in Seattle. Agent Schoenlein advised the defendant that they could discuss those matters later at the police station if the defendant chose to do so. Agent Schoenlein also advised the defendant of his Miranda rights. The defendant told Agent Schoenlein that he wanted to

waive his Miranda rights to tell his "side of the story".

14. At the police station the defendant once again indicated his desire to speak with Agents Schoenlein and Burroughs and he signed a form that listed and waived his Miranda rights. After conversation in which the defendant attempted unsuccessfully to convince Agents Schoenlein and Burroughs he had nothing to do with the arson the defendant was advised by the agents to tell the truth. At that point the defendant admitted starting the fire on January 5, 1995 at the Mary Pang business. The defendant gave a four page statement describing his actions which was written for him by Agent Schoenlein. The defendant read and initialed each page of the handwritten statement and signed the statement.

15. I have attached a true copy of the Information and Certification for Determination of Probable Cause in the case of *State of Washington vs. Martin Shaw Pang*, King County Superior Court Cause Number 9-1-00473-0 as Exhibit 1. I have also attached a true copy of the Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail as Exhibit 2. The Deputy Clerk of the King County Superior Court Clerk's Office is able to make this certification because he is an officer of the King County Superior Court and the original document is maintained in a file in the King County Suprerior Court Clerk's Office.

16. I have also attached a true copy of the Arrest Warrant and this is attached as Exhibit 3. In this jurisdiction it is the practice that the Clerk of the Superior Court issues the arrest warrant following the filing of the court's order to issue the warrant (refer to above Exhibit 2). The Chief of the Seattle Police Department is able to make this certification of

the arrest warrant as his department maintains records of unserved [sic] arrest warrants in Seattle.

17. I have also attached a true copy of the Motion, Certification and Order Permitting Filing of an Amended Information as Exhibit 4.

18. I have also attached a true copy of the Amended Information as Exhibit 5.

19. I have also attached to this affidavit the statements of the following witnesses:

Affidavit of Kim Kirkendall, Exhibit 6;
Affidavit of Kevin C. Hook, Exhibit 7;
Affidavit of Richard D. Binzer, Exhibit 8;
Affidavit of Paul H. Bentley, Exhibit 9;
Affidavit of Wayne E. McFall, Exhibit 10;
Affidavit of Karlyn Byham, Exhibit 11;
Affidavit of Robert S. King, Exhibit 12;
Affidavit of Cleave Odegard, Exhibit 13;
Affidavit of Marjorie G. Newman, Exhibit 14;
Affidavit of Rise Pang, Exhibit 15;
Affidavit of Charles T. Graves, Exhibit 16;
Affidavit of Richard C. Harruff, Exhibit 17;
Affidavit of Terri Haddix, Exhibit 18;
Affidavit of Michael J. Shannon, Exhibit 19;
Affidavit of Gary D. Schoenlein, Exhibit 20;

20. The above affidavits, Exhibit 6 through 20, were signed and sworn before a Notary Public who is authorized to administer an oath. I have thoroughly reviewed these statements and the attachments to them, and attest that the evidence indicates that Martin Pang is guilty of the offenses charged in the Amended Information.

[*s*] *Marilyn B. Brennan*
MARILYN B. BRENNAN
Senior Deputy Prosecuting
Attorney

SUBSCRIBED and SWORN to before me this 6th day of April, 1995.

[*s*] *Brian D. Gain*
BRIAN D. GAIN
Superior Court Judge
King County Superior Court

I, NORM MALENG, Prosecuting Attorney for King County, Washington, do hereby certify that Marilyn B. Brenneman is a duly appointed Senior Deputy Prosecuting Attorney for King County, Washington.

SIGNED this 6th day of April, 1995.

[Seal]

[*s*] *Norm Maleng*
NORM MALENG
King County Prosecuting Attorney [8]

This affidavit was amended by a Supplemental Affidavit in Support of Request for Extradition on July 21, 1995. It states:

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, TIMOTHY A. BRADSHAW, being duly sworn, do hereby depose and say:

1. I am a citizen of the United States and a resident of the State of Washington.

I have been engaged in the practice of law in the State of Washington since 1986.

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[8] *Id.* at 1-17 (exhibits omitted) (emphasis added).

3. Since September 01, 1988 I have been employed by the King County Prosecuting Attorney's Office as a Deputy Prosecuting Attorney. I was appointed Senior Deputy Prosecuting Attorney on January 01, 1994. My duties are to prosecute persons charged with criminal violations of the State of Washington. In the course of such prosecutions, I have become knowledgeable about the state criminal statutes and case law, including those related to the crime of Murder in the First Degree and Arson in the First Degree, and have prosecuted both Murder and Arson cases.

4. My co-counsel, Marilyn Brenneman, and I are responsible for prosecuting the case of *State of Washington vs. Martin Shaw Pang,* King County Superior Court Cause Number 95-1-00473-0. I am wholly familiar with the evidence and charges in this case filed by Ms. Brenneman and myself [sic], and with the contents of the relevant files of the King County Superior Court and the Office of the King County Prosecuting Attorney. I am additionally familiar with all previous submissions, affidavits, statutes, and exhibits filed by Marilyn Brenneman in support of our request for extradition.

5. Co-counsel Brenneman is currently out of the State of Washington attending her father's funeral and family duties.

6. On April 6, 1995, my co-counsel, Marilyn Brenneman, signed an affidavit in support of request for extradition of Martin Shaw Pang to stand trial for four counts of Murder in the first degree and one count of Arson in the first degree.

7. It is my understanding that the certification of the statute has been challenged by the defense and that minor amendments made to the murder statute

in 1990 were omitted. The omissions do not bear directly on the specific charges against Martin Shaw Pang. However, although these statutes were duly certified and authenticated in the body of the prior affidavit in support of the request for extradition, I am providing this supplemental affidavit to provide the court with a true and correct copy of current statutory language for Murder in the first degree, pursuant to Article IX, item 2, of the United States/Brazil extradition treaty. The text of all applicable statutes/legislation, the text of the appropriate statute of limitations, and the applicable penalties are attached as Supplemental Exhibit A, which I have also signed and dated.

8. I know of no other pertinent omissions, clerical or otherwise, in the affidavits and information previously provided in support of extradition of Martin Shaw Pang.

[s] *Timothy A. Bradshaw*
TIMOTHY A. BRADSHAW
Senior Deputy Prosecuting Attorney

SUBSCRIBED and SWORN to before me this 21st day of July, 1995.

[s] *G. T. Mattson*
GEORGE T. MATTSON
Superior Court Judge
State of Washington
United States[9]

On December 18, 1995, the Federal Supreme Court of Brazil granted extradition on the single count of arson

[9] Supplemental Affidavit in Support of Request for Extradition, King County Cause Number 95-1-00473-0, at 1-3 (attachments omitted).

in the first degree, but not on the four counts of murder in the first degree.[10] A summary provided by the Federal Supreme Court states:

> Summary.
>
> 1. Extradition.
>
> 2. U.S. citizen charged, by the Superior Court of King County, Seattle, Washington, U.S.A., as the perpetrator of four acts of murder in the first degree "by committing and attempting to commit the crime of arson in the first degree and in the course of and in furtherance of such crime, as well as in immediate flight therefrom." A charge was later added, accusing the person being sought of arson in the first degree as well, a class A felony.
>
> 3. *Inasmuch as the acts are covered under two district offenses, the majority of the Court decided, for purposes of the extradition, that the case is one of arson in the first degree under the law of the requesting State, corresponding in the Brazilian Penal Code to the crime of arson defined in Article 250, combined with its Paragraph 1, Section I, and with Article 258 of that same Code because of the resulting death of four persons.*
>
> 4. Consequently, *the decision by the majority of the Court did not hold that the situation as described was one of arson in the first degree, plus four separate first-degree murders.*
>
> 5. *Therefore, the Court, by majority vote, granted the requested extradition in part, for the crime of*

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[10] *See* Federal Supreme Court of Brazil decision on the Extradition, Number 00006541/120. Opinion Appendix "A." English translation from original Portuguese. *See* Clerk's Papers at 159-211 for opinion in Portuguese.

arson in the first degree, resulting in four deaths and the consequences thereof under U.S. law. However, the Court did so without the additional charge of four counts of first-degree murder.

6. The minority of the Court, as expressed in the opinion of the Rapporteur, granted the extradition under the terms of the petition by the Requesting State, so that the person being sought may be tried and judged according to the charge and addendum, under U.S. law. It did not stipulate any reservation.

7. *Lastly, the decision of the Court did not include any restriction as to the possibility of life imprisonment.*

DECISION

The case files having been reviewed and the case stated and discussed, the Justices of the Federal Supreme Court, meeting in plenary session and acting by majority vote in accordance with the minutes of the judgment and the transcript thereof, *grants the extradition in part, on the grounds that the charges of arson in the first degree and murder in the first degree, as described in the extradition request, correspond in Brazil to the single crime that is defined in the main part of Article 250 and in Article 258 of the Brazilian Penal Code. Therefore, they exclude from the grant of extradition the charges of murder in the first degree. Also by majority vote, the Court decided to reject the need to condition surrender of the person sought on a pledge to commute life imprisonment to a maximum of 30 years imprisonment.*

Brasilia, December 18, 1995
[Signatures]
Sepúlveda Pertence, Chief Justice
Néri da Silveira, Rapporteur[11]

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[11] Clerk's Papers at 321-23 (emphasis added).

The United States through its Embassy on February 22, 1996 requested written authorization from the Brazilian Ministry of Foreign Affairs to prosecute Petitioner Pang "in accordance with the revised code of Washington, Title 9A, Sections 48.020 and 32.030(1)(c), which provide for punishment of an individual who commits arson, and in the course of that crime, causes the death of a person who was not a participant in the crime."[12] The letter, which mentioned "arson," but did not mention "murder," stated:

> The Government of the United States respectfully requests that, pursuant to Article XXI of the Extradition Treaty between Brazil and the United States of America, done at Rio de Janeiro on January 13, 1961, or any other legal basis, the Government of the Federal Republic of Brazil provide written authorization, to the United States to prosecute MARTIN SHAW PANG in accordance with the revised code of Washington, Title 9A, Sections 48.020 and 32.030(1)(C), which provide for the punishment of an individual who commits arson, and in the course of that crime, causes the death of a person who was not a participant in the crime. As recognized by the Brazilian Supreme Court, these provisions of the Revised Code of Washington criminalize the same conduct as described in Sections 250 and 258 of the Brazilian Penal Code.[13]

By letter of February 27, 1996 the Brazil Ministry of Foreign Affairs denied the request, indicating it did not have jurisdiction to interfere with the extradition order of the Federal Supreme Court of Brazil.[14] After reiterating a

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[12] Letter from the United States Embassy to the Brazil Ministry of Foreign Affairs dated February 22, 1996. RCW 9A.32.030(1)(c) is the Washington statute relating to murder in the first degree.

[13] *Id.*

[14] Letter from the Brazil Ministry of Foreign Affairs to the United States Embassy dated February 27, 1996.

portion of the ruling of the Federal Supreme Court, the letter read:

> The Ministry of Foreign Affairs points out to the Embassy of the United States of America that, *pursuant to the provisions of the Federal Constitution on the separation of powers* in the government, *the Executive Barnch does not have jurisdiction to interpret or establish limits regarding the scope of the decision handed down by the Judicial Branch, which has exclusive jurisdiction with respect to any interpretation of judicial acts.*[15]

On February 28, 1996, Petitioner Martin Shaw Pang was surrendered by Brazil into custody of United States of America authorities: He was immediately returned to the United States and the State of Washington.[16]

The United States appealed to the Federal Supreme Court of Brazil seeking clarification of the extradition order.[17] The appeal states in its Summary:

> By granting extradition only on the basis of the Washington arson statute, the Brazilian Supreme Court's decision in the case of Martin Shaw Pang would have the unfortunate effect of preventing United States authorities from prosecuting Mr. Pang for the consequences of the arson; namely, the resulting deaths. The arson statute in the State of Washington is equivalent only to Article 250 (simple arson) of the Brazil Penal code; it penalizes only the arson itself, *but not the resulting deaths.* As such, the Washington arson does not punish the crime in the same way that Article 258 (aggravated arson) of the Brazilian Penal Code would. Rather in the State

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[15] *Id.* (italics ours).

[16] *See* Record of Surrender of Person Being Extradited, No. 02/96, Clerk's Papers at 362-63.

[17] *See* Request for Declaration [sic: Clarification] (Embargo Declaracao [sic]).

> of Washington, the only law that truly corresponds to Article 258, by taking into proper consideration the deaths of the four firefighters, is the "felony murder" law (which, although codified within the first degree homicide statute, is different from the other first degree homicides because it does not require premeditated intent to kill). Accordingly, the approval of extradition only for arson would be equivalent to granting extradition only for the offense punished under Article 250, but not the offense punished under Article 258.
>
> Such limitation would be significant because of the potentially minimal sentence [Mr.] Pang could receive if prosecuted only under Washington arson statute. Although the crime of arson theoretically carries a punishment of life in prison, because of the existence of mandatory sentencing guidelines under Washington State law, the presumptive sentence for [Mr.] Pang would be only 21 to 27 months in prison. Such a penalty for a crime in which four men lost their lives would be grossly unfair and disproportionate to the gravity of the offense. It is for this reason that the Government of the United States and the people of the State of Washington are so concerned about the way in which the Court's decision is framed. It would be extremely unfortunate if a merely technical difference in our respective legal systems were to result in a severe injustice. The United States therefore respectfully requests that the Court clarify its ruling, so as to permit the prosecution of Pang for the two Washington State offenses—arson and felony murder—that most closely correspond to Article 250 and 258 of the Brazalian Penal Code.[18]

On March 27, 1996, the Federal Supreme Court rejected the appeal, holding that its extradition order unam-

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[18] State's Answer to Motion for Discretionary Review to the Supreme Court, filed January 8, 1997, Exhibit K.

biguously excluded the charges of murder in the first degree from the grant of extradition.[19] The court stated:

> SUMMARY. [1.] Extradition. Appeal for clarification.
>
> 2. U.S. citizen charged, in the State of Washington, U.S.A., with the crime of arson in the first degree and with four acts of murder in the first degree, the victims being firefighters who assisted in fighting the fire.
>
> 3. By majority of votes, this Court, inasmuch as the acts are covered under two distinct offenses, decided that the case is one of arson in the first degree under the law of the requesting State, corresponding in the Brazilian Penal Code to the crime of arson as defined in Article 250, combined with its Paragraph 2, Section I, and with Article 258 of that same Code because of the resulting death of four persons.
>
> 4. Appeal for clarification by the requesting State arguing the existence of contradictions and obscurities in the decision.
>
> 5. It is alleged in the appeal for clarification that the facts as set forth in the request for extradition describes a case of arson that resulted in the deaths of four firefighters; however, the definition of the offense adopted in the decision now being appealed does not encompass the resulting deaths, only the threat against the life of any person or firefighter. [The decision held that] the crime of arson in the first degree, according to the Revised Code of Washington, is equivalent solely to the crime of arson in Article 250 of the Brazilian Penal Code and does not include the hypothesis found in Article 258 of said

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[19] *See* Appeal for Clarification,—Extradition No. 00006545/122, Clerk's Papers at 312-316. English translation from the original Portuguese.

Code. The appeal for clarification further argues that the crime of arson in the first degree and the crime of murder in the first degree (termed "felony murder") are considered by the Revised Code of Washington as being independent criminal offenses and that the latter is equivalent to the crime described in Article 258 of the Brazilian Penal Code. It is also alleged in the appeal that if the terms of the decision now being appealed were upheld, the requesting State would be unable to prosecute and try the person whose extradition is being sought for the deaths resulting from the fire.

6. Regulatory and procedural limits on appeals for clarification according to Federal Supreme Court case law. Appeals for clarification must not infringe upon the judgment. The greater degree of flexibility that is allowed them, as an exception in cases of obvious material error or manifest nullity of the decision, does not justify their inappropriate use to challenge the correctness of a judgment on the merits and to achieve its modification.

7. *The absence of any doubt or obscurity as regards the denial of the extradition with respect to the charges of the four crimes of murder in the first degree is demonstrated in the terms of the decision, which did not consider the facts, as described in the request, as characterizing independent crimes of arson in the first degree and murder in the first degree. The extradition was granted without any restrictions as to the possibility of life imprisonment; but only on the crime of first-degree arson with the results it produced (four deaths) and all the consequences thereof pursuant to United States law without, however, the added charge of four counts of murder in the first degree.*

8. Nor is there any contradiction in the decision under appeal. The contradiction would have to have

arisen unexpectedly among the parts of the judgment itself, in the logical composition thereof. The position of the majority of the Court, reflected in the decision, did not acknowledge the occurrence, in the case at hand, of independent crimes but only the crime of arson in the first degree with its results and consequences (four deaths) according to U.S. law. It should be noted, furthermore, that Article 258 of the Brazilian Penal Code does not define an independent crime other than the one described in Article 250 thereof. Only the results described therein (physical injury or death) were considered by the legislator [sic] to serve as qualifying circumstances in crimes of common peril, including arson, aggravating the penalty.

9. Likewise *there is no mistake or obvious error in the decision now being appealed. The decision resulted from a thorough discussion by the members of this Court that took the facts and their legal context into account.*

10. The Federal Supreme Court is not insensitive to the serious concerns expressed in the appeal for clarification as regards potential restrictions on the amount of the penalty that could be imposed in the requesting State on the person whose extradition is sought, by virtue of the limits established in the granting of the request on a partial basis only. However, it is not appropriate in a decision on extradition to give primary consideration in the requested State to the aspect of the cases involving the amount of the penalty that the requesting State may, under its legislation, impose on the person being sought, unless there is a specific restriction in the requested State, as in Brazil with the rejection of the death penalty.

11. Apart from that reservation, given the limited scope of the appeal for clarification, it is not possible

in the appeal to evaluate the merits of the controversy regarding the penalties which the requesting State might, by application of its domestic laws, impose on the person whose extradition is being sought. *This position is not ascribable to a lack of interest on the part of the Court as regards the need for cooperation on the international level between the governments of different countries for purposes of combating crime. Rather, it results from the legal impossibility, under Brazilian procedural law, to reconsider a matter already discussed in the court record of the judgment on the extradition.*

12. *Appeal for clarification rejected.*

DECISION

The case files having been reviewed and the case stated and discussed, *the Justices of the Federal Supreme Court,* meeting in plenary session and in accordance with the minutes of the judgment and the transcript thereof, *unanimously agree to deny the appeal.*

Brasília, March 27, 1996
[Signatures]
Sepúlveda Pertence, Chief Justice
Néri de Silveira, Rapporteur[20]

The King County Prosecuting Attorney issued a statement on February 29, 1996 asserting the opinion of the Federal Supreme Court of Brazil is ambiguous, but, at the same time, acknowledging that the Court declined to reconsider or to "clarify" its opinion. The statement, contrary to the record, also asserts certain promises or agreements by Brazilian officials to waive objection to prosecution of Petitioner Pang for murder in the first degree. The statement reads:

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[20] *Id.* at 312-16 (italics ours).

Statement of King County Prosecuting Attorney Norm Maleng on the Return of Martin Pang:

At this very moment, Martin Pang is airborne—he is on the final leg of his trip back to Seattle, where he will stand trial for the crime that killed four firefighters.

As of today, the opinion from the Brazilian Supreme Court does not clearly authorize the prosecution of Martin Pang for felony murder. The opinion must be clarified before we proceed.

Our fight to clarify this decision continues on two fronts:

First, the State Department will file tomorrow a motion asking the Brazilian Supreme Court to reconsider and clarify its ruling;

Second, Secretary of State Warren Christopher, who arrives in Brazil tomorrow, will personally ask the Brazilian government to extradite Martin Pang without restriction.

Let me outline some recent events in the case:

• *Attorney General Janet Reno called her counterpart in Brazil, Justice Minister Nelson Jobiem* [sic], *two weeks ago. Minister Jobiem* [sic] *assured the United States that his government would grant our request for extradition of Martin Pang without restrictions;*

• *Last month a delegation from the United States, led by Ambassador Lavitsky* [sic] [Levitsky], *met with the Brazilian Minister of Justice and reached agreement in principle that Brazil would waive any objections to the full prosecution of Martin Pang under Washington law.*

The U.S. delegation worked together with Brazilian officials to draft the promised waiver and diplomatic note.

Our delegation left Brazil with the assurance that Pang would be extradited with no restrictions.

• Despite these assurances, we have been waiting for action on the waiver;

• *Last Friday, the Brazilian Supreme Court issued its written opinion on the case. The court's opinion is ambiguous.*

Some portions of the summary opinion seem to limit the prosecution to a single count of arson, yet other portions of the summary opinion seem to defer to the consequences under American law for an arson that results in death, making the summary ambiguous and in need of clarification.

That is why the United States will file a motion for reconsideration tomorrow.

• On Monday, the United States Department of State transmitted an official diplomatic note to the government of Brazil, requesting a specific waiver under the extradition treaty, lifting all restrictions.

• *On Tuesday of this week, the Brazilian government responded, officially denying the request from the United States.*

We have not yet succeeded in our goal to have Martin Pang tried for felony murder.

I say today what I said two months ago:

This is unjust and unfair.
We have not given up the fight.

Two avenues remain to try and turn this result around:

• First, the United States will file a motion for reconsideration tomorrow, urging the Supreme Court of Brazil to reconsider and clarify their opinion.

• Second, Secretary of State Warren Christopher arrives in Brazil on Friday for a series of meetings with Brazilian officials. The Pang case is on his agenda.

He will express the strong disappointment of the United States government and ask that the Executive branch grant the waiver requested by the United States allowing unrestricted prosecution.

Martin Pang is returning today because we are nearing the end of the 60 day period for his return as required under the treaty.

We have *not* given up on either the diplomatic or legal avenues to correct this injustice.

Arraignment will be scheduled within two weeks from today.[21]

On April 5, 1996 the King County Prosecuting Attorney filed in the King County Superior Court the Affidavit of Timothy A. Bradshaw in Support of the State's Response to Motion to Dismiss which states:

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, TIMOTHY A. BRADSHAW, Senior Deputy Prosecuting Attorney for King County, hereby declares and says:

1. I am familiar with the facts in this matter. As one of the two Senior Prosecutors assigned to this case, I have been in routine contact with the United States attorneys assigned to this extradition matter of Martin Shaw Pang. I have also been advised about the actions of the United States government pertinent to the extradition of the defendant.

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[21] Clerk's Papers at 131-32 (emphasis added).

2. As a member of the United States delegation to Brazil, I obtained direct knowledge of Brazilian Jurisprudence and extradition procedures applicable to the Pang case. The delegation was comprised of United States Ambassador [Melvyn] Levitski [sic:] [Levitsky], U.S. Justice Department Attorneys Gregory Stevens and Thomas Snow, U.S. State Department Legal Advisor Paulo Di Rosa, and myself.

3. *On January 23, 1996, the delegation met personally with the Brazilian Minister of Justice, Nelson Jobim. In that meeting, the Minister stated his position, as a representative of the Executive, on the Pang extradition, and requested (and received) my personal assurance that* [*Mr.*] *Pang would be taken from his country by March 01, 1996.*

4. *Justice Minister Jobim stated that Brazil has no objection to our prosecution of* [*Mr.*] *Pang on the charges of Murder and Arson. Additionally, the Minister told me that "if I were you, I would prosecute on Murder—The United States system must decide."*

5. The United States appealed the decision of the Brazilian Court, published February 23, 1996. The Request For Declaration [sic:] [Clarification] (Embargo Declaracao [sic]) was filed March 01, 1996 with the Supreme Court of Brazil, sitting in Brasilia, according to Mr. Di Rosa, Mr. Steven, and the U.S. Embassy in Brazil.

6. *I personally spoke with the Deputy Secretary of Justice for Brazil on February 29, 1996. The Secretary* [*of*] *Justice advised me, yet again, that Brazil does not object to the Murder charges.*

7. *Also on February 29, 1996, the day the defendant was returned to the United States, a local TV station caught up with Minister Jobim at the University of Texas Law Center.* [*Justice Minister*]

Jobim stated for the news camera that "[Mr.] Pang's extradition was granted, he has been returned, and he is now subject to American Law."

8. On March 27, 1996, The Brazilian Supreme court ruled on the Embargo de Declaracao. The Court voted unanimously to deny the request for clarification. The American Embassy of Brazil has informed us of the following specifics. The Court ruled that its original decision required no clarification. Several Justices noted that the decision was procedurally dictated; that is, the Court could not now address the merits of the case, just the technical issue of clarification. *Several Justices also expressed regret if the Court's decision is held to prevent [Mr.] Pang's prosecution for the consequences of his criminal actions.*

Justice Neri [sic] Da Silveira, the Rapporteur for the Pang case, requested the opinion of the Prosecutor General Geraldo Brindeiro at the open-court session. *[Mr.] Brindeiro responded that [Mr.] Pang should be extradited without any restriction for the most comparible and appropriate charges: Felony Murder. Justice Silveira then explained the procedural limitations of the current appeal to matters of clarification—rather than reconsideration of the original judgment—and that a contradiction does not appear. [Justice] Silveira maintained, without contradiction from the other nine Justices, that the Brazilian Court's decision does* not *prevent Washington State from trying [Mr.] Pang for the consequences of his alleged crime, the deaths of four firefighters.*

In the same proceeding, Justice Resek [sic] spoke at some length. [Justice] Resek [sic] noted that the appeal contained excellent arguments which he would have used were he Washington State's lawyer. Justice Resek [sic] noted a "grave incongruence" between what the Court had intended, and what would appar-

ently happen as a result of the Court's decision. Four firefighters had died in Seattle, he said, and their deaths must be taken into consideration in [Mr.] Pang's trial. [Justice] Resek [sic] then expressed great concern about the presumed leniency of [Mr.] Pang's sentence should he be convicted only of Arson in the First Degree; he noted that the presumed Brazilian sentence for the same criminal conduct is far greater that [sic] Washington State's. [Justice] Resek ended by declaring that he has now decided to advocate for revamping the entire extradition process in Brazil.

9. While the Court has not provided its written opinion. A [sic] complete transcription of the court proceedings is expected after April 16, 1996.

10. I am informed by the Justice and State Departments that diplomatic efforts are continuing in an effort to obtain the written consent of the Brazilian executive branch to try the defendant for the charges he was arraigned on, pursuant to the Brazil/ United States Treaty.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 05th day of April, 1996.

[*s*] *Timothy A. Bradshaw*
TIMOTHY A. BRADSHAW
WSBA No. 17983 [22]

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[22] Affidavit of Timothy A. Bradshaw in Support of State's Response to Motion to Dismiss, Clerk's Papers at 145-148A (emphasis added).

The affidavit and its content was referred to in at least four documents submitted to the trial court by the King County Prosecuting Attorney.[23] However, on November 12, 1996, the State withdrew the affidavit from the Court's consideration, stating that because the "United States, [sic] has been provided written authorization, a signed document from the Minister of Justice from Brazil, it's no longer necessary to attempt to prove a non-objection or acquiescence from verbal statements. . . . [W]e'd be happy to withdraw that affidavit from the Court's consideration

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[23] *See* Memorandum in Opposition to Defendant's Alternative Motion for Dismissal of Counts 1 through 4; and a Writ of Habeas Corpus, filed April 5, 1996, Clerk's Papers at 133-43 ("The Brazilian executive branych [sic] has verbally waived Brazil's specialty rights under the extradition treaty and may elect to provide the United States with a written waiver at any time prior to the trial of this matter." Clerk's Papers at 139 (footnote omitted) ("A representative of the Brazilian executive branch has verbally waived the rule [of specialty]." Clerk's Papers at 141.); *see also* Memorandum in Opposition to Defendant's Alternative Motions to Dismiss Counts I-IV; Require an Offer of Proof; Expedite Pre-Trial Hearings and for Discovery, filed July 8, 1996, Clerk's Papers at 229-48 ("The affidavit outlined formal and personal meetings with Brazilian officials. The affidavit remains true and valid." Clerk's Papers at 231. "As was stated at the April 09 hearing, a verbal waiver was in fact obtained." Clerk's Papers at 236.); *see also* State's Opening Memorandum of Points and Authorities Re: Extradition; the Rule of Specialty; Waiver and Defendant's Motion to Dismiss Counts 1-4, filed on July 25, 1996, Clerk's Papers at 374-390 ("The Brazilian government would not object, according to multiple statements made by Justice Minister to members of the U.S. delegation are accurately recited in the previously filed affidavit of Timothy Bradshaw." Clerk's Papers at 382); *see also* Opposition to Dismiss, filed on Nov. 4, 1996 Clerk's Papers at 428-64 ("A United States delegation traveled to Brasilia on January 23, 1996 and met with The [sic] Minister of Justice. *See* filed Affidavit of Tim [sic] Bradshaw." Clerk's Papers at 433. "It is interesting to note, however, that the Brazilian executive, through its Minister of Justice (the equivalent of the United States Attorney General) has indicated that it will not object to a decision by the United States to try the defendant for Murder in the First Degree." (Clerk's Papers at 441.).

on the motion today."[24] Even though this affidavit was previously withdrawn, it was submitted to the Supreme Court as a supporting document on January 8, 1997.[25]

The Honorable William J. Clinton, President of the United States of America, on May 21, 1996 wrote to the Honorable Fernando Henrique Cardoso, President of the United States of Brazil, seeking his "personal assistance" in overcoming the extradition ruling of the Federal Supreme Court of Brazil.[26] His letter stated the "Brazilian Supreme Court, based on technical differences in our laws, has twice issued decisions that permit Pang's prosecution on charges of arson but not of murder."[27] The letter then stated:

> Such a limitation will prevent justice from being done in this case. Attorney General [Janet] Reno has worked closely with members of your Administration, but all avenues of judicial relief have been exhausted. Although some in your government interpret it more restrictively, our extradition treaty may be read to legally permit the Government of Brazil to agree to

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[24] Hearing Before the Honorable Larry A. Jordan, November 12, 1996, Transcript at 16.

[25] *See* State's Answer to Motion for Discretionary Review, Exhibit G. We observe with criticism that there were significant representations made in the affidavit which were either not based upon fact supported by the record or were made with a reckless disregard for whether they were based upon fact. Those questionable representations were made not only in the affidavit, but were substantially repeated by counsel for the State in proceedings before the King County Superior Court. Zealous prosecution of a criminal case is highly to be commended. But zealousness to the point of misleading, misrepresentation, or fabrication is greatly to be condemned.

[26] Letter from William J. Clinton, President of the United States, to Fernando Henrique Cardoso, President of Brazil, dated May 21, 1996.

[27] *Id.*

> prosecution of [Mr.] Pang for all charges against him. Our respective legal experts have already prepared a mutually acceptable statement that would serve the purpose. Should you be unable to provide us with such a statement, as an alternative please consider providing a more limited written statement simply saying that your government would not object to [Mr.] Pang's prosecution on all charges.[28]

On September 26, 1966, Minister of State for Justice Nelson A. Jobim wrote to United States Attorney Janet Reno stating: [29]

> In response to the inquiry by the Department of Justice, I am writing to Your Excellency to discuss the extradition proceeding of U.S. citizen Martin Shaw Pang.
>
> *In Brazil, as in the United States of America, the concept of the separation of the three branches of the national government derives from the text of the Federal Constitution itself. Under this system, the Judicial Branch alone is responsible for interpreting any legal instrument in force in the country, including those derived from international agreements and treaties (Article 102(III)(b) of the Federal Constitution), which once incorporated into the domestic legal system, are equivalent to federal statutes (Article 105(III)(a) of the Federal Constitution).*
>
> *The exclusive jurisdiction of the Federal Supreme Court to process and rule on any extradition request by a foreign State derives, in turn, from Article 102(I)(g) of the Federal Constitution. Decisions*

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[28] *Id.*

[29] Letter from Nelson A. Jobim, Minister of State for Justice of Brazil to Janet Reno, United States Attorney General dated September 26, 1996 (emphasis added). English translation from original Portuguese.

granting or denying extraditions may not be appealed, and the Executive Branch may not limit or make comments of any kind regarding the content or scope of rulings handed down by that Court, which is the highest authority of an independent branch of government. Consequently, any interpretive statement the Executive Branch might make would be unenforceable.

As for your concern regarding possible limits on the requesting State's right to punish vis-à-vis the extradited defendant, *it should be emphasized, on the basis of fundamental precepts of public international law, that legally binding international acts are the only legal instruments capable of binding two or more sovereign States together. Thus, provided that the terms of the Treaty of Extradition between Brazil and the United States of America of January 13, 1961, are respected, it will be incumbent upon the justice system of the United States of America to establish a suitable punishment for the crime of arson in the first degree, resulting in four deaths and the consequences thereof, under U. S. law.* It goes without saying that *the precise interpretation of this language, used by the Brazilian court in its decision, and the determination of how it might best be adapted to U.S. Law, are for the justice system of your country to decide.*

Very truly yours,

[Signature]
Nelson A. Jobim
Minister of State for Justice

On October 25, 1996, the King County Prosecuting Attorney filed a second amended information. Most significantly, it changed the wording of the charge of arson in the first degree in Count V of the amended informa-

tion to include reference to subsection (d) of the arson statute and to add new assertions. It states:

> I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse MARTIN S. PANG of the crime of Arson in the First Degree, committed as follows:
>
> That the defendant MARTIN S. PANG in King County, Washington on or about January 5, 1995, did knowingly and maliciously *and with intent to collect insurance proceeds* cause a fire or explosion *on property valued at ten thousand dollars located at 811 Seventy* [*sic*] *Avenue South, Seattle* (the Mary Pang Warehouse), *which was manifestly dangerous to human life, including firemen;*
>
> Contrary to RCW 9A.48.020(1)(a) and (d), and against the peace and dignity of the State of Washington.[30]

Other changes in the second amended information included the order of the counts. Count I was assigned to the charge of arson in the first degree and Counts II-V were assigned to the charges of murder in the first degree. There was also deletion of the phrase "together with another" in the charges of murder in the first degree, thus making Petitioner Pang solely responsible.

By letter of October 29, 1996, President Cardoso responded to President Clinton's letter of May 21, 1996, stating that in Brazil the executive branch could not alter the scope of the extradition decision of the Federal Supreme Court.[31] The letter stated:

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[30] (Emphasis added.) The first Amended Information did not include the "valued at ten thousand dollars" or the "intent to collect insurance proceeds" which corresponds with RCW 9A.48.020(1)(d).

[31] Letter from Fernando Henrique Cardoso, President of Brazil, to William J. Clinton, President of the United States, dated October 29, 1996.

> Despite the personal interest I took in the issue, the consideration of the alternatives at hand clearly indicated that room for action by the Executive branch is very limited, since a decision has already been taken by the Supreme Court.
>
> I have referred the case back to Minister of Justice Nelson Jobim, who recently wrote to Attorney General Janet Reno on the subject. I understand his letter provides the American government with a broad and clear picture of the Brazilian legal position on the issue.[32]

On November 12, 1996, the Honorable Larry A. Jordan, King County Superior Court, denied a motion by Petitioner Martin Shaw Pang to dismiss or sever the murder charges from the arson charge which Petitioner urged was required by the limitation in the extradition order issued by the Federal Supreme Court of Brazil and denial of the appeal by the United States of America for clarification. In rendering his decision, Judge Jordan stated "it appears to this Court reasonably clear that Brazil did not extradite for felony murder."[33] However, he held that because of Brazil's implicit waiver, Petitioner Pang lacked standing to assert a violation of Article XXI of the Treaty in his effort to limit his prosecution to arson in the first degree. In denying Petitioner Pang's motion, Judge Jordan stated in part:

> Now, the response by Minister Jobim certainly is not an express agreement or express waiver as that term is used in law. However, his conduct and his words in my judgment, are an implicit waiver or a consent or assent by words or conduct. By not objecting and by communicating as he did in the last

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[32] *Id.*

[33] Reporter's Verbatim Report of Court's Oral Decision, November 12, 1996, at 4.

paragraph and last sentence, stating that the determination of how it best be adapted to U.S. law, it seems to this Court is tantamount to a waiver of the provision of Article XXI [34] of the Treaty.

I conclude and find that on this record, because of that implicit waiver that Mr. Pang lacks standing to asserts a violation of Article XXI and he may be tried for all counts, including the four counts of murder, and that this Court has jurisdiction.[35]

The order denying Petitioner's motions, signed by Judge Jordan on January 13, 1997, reads in its entirety:

The court, having considered the filed motion, memoranda, exhibits and arguments by defense counsel, in support of the motion to dismiss, and by the State, in opposition to the motion to dismiss, and having conducted independent legal research, hereby enters the following finding and order:

The court has jurisdiction over the defendant on all counts in the Second Amended Information. The defendant's motion to dismiss Counts II-V of the Second Amended Information is denied for the reasons articulated in the court's oral ruling of November 12, 1996.

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[34] Article XXI states: "A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request, nor may he be re-extradited by the requesting State to a third country which claims him, unless the surrendering State also agrees or unless the person extradited, having been set at liberty within the requesting State, remains voluntarily in the requesting State for more than 30 days from the date on which he was released. Upon such release, he shall be informed of the consequences to which his stay in the territory of the requesting State would subject him."

[35] Reporter's Verbatim Report of Court's Oral Decision, November 12, 1996, at 10.

DONE IN OPEN COURT this 13 day of January, 1997.

[s] *Larry A. Jordan*
THE HONORABLE LARRY JORDAN

SUBMITTED BY:

Browne & Ressler
Attorneys for
Martin Shaw Pang

[s] *John H. Browne*
JOHN HENRY BROWNE
WSBA #4667

[s] *M. Timothy Dole*
M. TIMOTHY DOLE
WSBA #25372

COPY RECEIVED AS TO FORM:

Deputy Prosecuting Attorneys
for King County

[no signature]
TIMOTHY A. BRADSHAW
WSBA #17983

[no signature]
MARILYN B. BRENNEMAN
WSBA #10700

[no signature]
STEPHEN P. HOBBS
WSBA #18935 [36]

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[36] Clerk's Papers at 592-93.

By letter of January 14, 1997, Dr. Celso Spitzcovsky and Dr. Roberto B. Dias (da Silva) wrote to Brazil Justice Minister Jobim on behalf of Petitioner Pang, the letter stating in part: [37]

> Also added to the American case was an *affidavit* of Timothy A. Bradshaw, on behalf of the King County Prosecutor's Office, in which a conversation with Your Excellency is related, with the following content:
>
> > "The Justice Minister Jobim affirmed that Brazil has no objection to our prosecution of [Mr.] Pang on the charges of homicide and arson. Additionally, the Minister told me, 'If I were you, I would prosecute on homicide—the justice system of the United States should decide.' "
>
> On November 12, 1996, adopting the theory of the Prosecutor's Office, Judge Larry A. Jordan interpreted the fourth paragraph of the letter that Your Excellency forwarded to the Attorney-General as implicit permission, from the Brazilian Executive Branch of the American justice system, to transgress Article 21 of the Treaty of Extradition and Additional Protocol between Brazil and the U.S.A.—ratified by Brazil on August 25, 1964—thus permitting a violation of the extradition order issued by the Federal Supreme Court.[38]

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[37] *See* Dr. Spitzcovsky's and Dr. Dias' letter of January 14, 1977 to Brazil Justice Minister Jobim, Clerk's Papers at 654-55. In the letter they state they are in the "Capacity of advocates of Martin S. Pang's interests in Brazil." This is generally equivalent to "legal counsel" in our State. Clerk's Papers at 655. English translation from original Portuguese.

[38] *Id.*

By letter of February 26, 1997, Brazil Minister of Justice Jobim responded to the September 26, 1996 letter from Dr. Spitzcovsky and Dr. Dias (da Silva) stating:

> With reference to the Fax dated last January 14th, where you comment on the extradition of the North-American citizien [sic] Martin Shaw Pang, *I'd like to inform you that at no time did I provide any type of interpretation on the content and reach of the decision passed by the Federal Supreme Court. Thus, I ratify all the words used in said correspondence, its only objective being to clarify to Ms. Janet Reno, Attorney-General of the United States, some aspects of the Brazilian Constitutional system.*
>
> 3. [sic] *I'd like to stress once again that the criteria in judging the case, in light of the Treaty of Extradition currently used between the two countries and the decision of the Federal Supreme Court on extradition, are the exclusive interpretation of the North-American Judicial System, which must apply the norm to the concrete case.*
>
> Sincerely,
>
> [Signature illegible]
> Nelson A. Jobim
> State Ministry of Justice [39]

On December 4, 1996, Petitioner filed a motion for direct discretionary review by this Court which we granted on February 6, 1997.

DISCUSSION

Applicable Washington Law

Petitioner Martin Shaw Pang is now charged in the King County Superior Court by Second Amended Infor-

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[39] *See* Clerk's Papers at 659 (emphasis added). English translation from original Portuguese.

mation in Count I with arson in the first degree, a class A felony, under RCWA 9A.48.020(1)(a) and (d) and (d) and in Counts II-V wit hfour counts of murder in the first degree, a class A felony, under RCW 9A.32.030 (1)(c).

RCW 9A.48.020(1)(a) and (d) states in part:

> (1) A person is guilty of arson in the first degree if he knowingly and maliciously:
>
> (a) Causes a fire or explosion which is manifestly dangerous to any human life, including firemen; or
>
> . . . .
>
> (d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.
>
> (2) Arson in the first degree is a class A felony.

RCW 9A.32.030(1)(c) states in part:

> (1) A person is guilty of murder in the first degree when:
>
> . . . .
>
> (c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) *arson in the first or second degree,* (5) kidnapping in the first or second degree, *and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants*: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.

(Emphasis added.)

Under the Sentencing Reform Act of 1981, RCW 9.94A.310, arson in the first degree has a seriousness score of VIII. If convicted of that crime, Petitioner, with an offender score of zero, under the guidelines would be subject to a standard sentence range of 21 to 27 months. However, under RCW 9.94A.390 a sentencing court may in its discretion depart from the guidelines and impose an aggravated exceptional sentence above the standard range if statutory criteria are met and the sentencing court identifies them:

The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

. . . .

(2) Aggravating Circumstances

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

. . . .

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary less substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

. . . .

(i) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter as expressed in RCW 9.94A.010.

Under RCW 9A.20.021 the maximum sentence Petitioner Pang could receive if he is found guilty of arson in the first degree, a class A felony, is "confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine[.]" This was a factor considered by the Federal Supreme Court of Brazil in its decision on extradition.

STANDING

(1) *Does Petitioner Pang have standing to object to violation by the State of Washington of the terms of the order on extradition issued by the Federal Supreme Court of Brazil?*

The State argues that Petitioner Pang does not have standing to assert any post-extradition limitations on his prosecution because the Brazilian Executive, through Minister of Justice Nelson A. Jobim, does not object to King County prosecuting Petitioner on four counts of murder in the first degree. The State correctly recognizes the exception of the doctrine of specialty which allows the requesting state to prosecute an accused for a crime other than that for which the accused was extradited when the asylum state consents.[40] However, in the absence of that consent by the asylum state, an extradited person may raise any objections to post-extradition proceedings which might have been raised by the rendering country.[41]

The rule in at least three United States circuit courts is that an extraditee has standing "to raise any objections which the requested nation might have asserted," subject to the limitation that "the requested nation may waive its right to object to a treaty violation and thereby deny the defendant standing to object to such action."[42] At least four other circuits have left the question of standing unanswered, with some indicating approval of the prevailing rule.[43]

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[40] *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986).

[41] *See United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

[42] *United States v. Puentes*, 50 F.3d 1567, 1575 (11th Cir.), *cert. denied*, 116 S. Ct. 341 (1995); *accord United States v. Fowlie*, 24 F.3d 1059, 1064 (9th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995); *Leighnor v. Turner*, 884 F.2d 385, 389 (8th Cir. 1989).

[43] *See United States v. Saccoccia*, 58 F.3d 754, 767 n.6 (1st Cir. 1995) ("[W]hile we take no view of the [standing] issue. . . . the

The State also asserts that a minority of United States circuit courts deny standing absent affirmative protest by the surrendering State. However, this purported split in the circuits is illusory. Two of the three cases the State cited for this proposition are not standing cases at all, but were resolved against the extraditees on the merits.[44] The third case merely noted the defendant's standing was questionable before reaching the merits.[45]

The State urges this Court to find that Brazil's Executive, through Minister of Justice Nelson A. Jobim, "implicitly consented" to prosecution of Petitioner Pang by the State of Washington on four counts of murder in the first degree. We agree with the rule expressed in *Najohn* that only express consent to prosecution will be

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side that favors individual standing has much to commend it." (citations omitted)), *cert. denied*, 116 S. Ct. 1322 (1996); *see also Casey v. Department of State*, 980 F.2d 1472, 1476 n.4 (D.C. Cir. 1992) ("it remains an open question in this circuit whether [the defendant] has 'standing' to raise his claims after extradition") (citing *United States v. Sensi*, 879 F.2d 888, 892 n.1 (D.C. Cir. 1989) (reserving question of standing); *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992) (declining to address the standing issue); *United States v. Herbage*, 850 F.2d 1463, 1466 (11th Cir. 1988) ("For purposes of this case, we assume, without deciding, that an individual has standing to allege a violation of the specialty principle."), *cert. denied*, 489 U.S. 1027 (1989).

[44] *Frocconi v. Attorney General*, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972) and *United States v. Kaufman*, 858 F.2d 994 (5th Cir. 1988).

[45] *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985) ("The right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested.") (citing *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979)); *accord Kaiser v. Rutherford*, 827 F. Supp. 832, 835 (D.C. 1993) ("therefore he has no standing to raise this issue. . . . Even assuming, *arguendo*, that the Plaintiff had standing to assert a claim in this regard, the doctrine of specialty simply requires that the prosecution be based on the same facts as set forth . . . ." (citations omitted)).

considered a waiver of the doctrine of specialty.[46] The letter from Brazil Minister of Justice Jobim to United States Attorney General Janet Reno cannot logically be interpreted as either an implicit waiver or an explicit waiver. The subsequent letter of February 26, 1997 from Minister Jobim unequivocally explains the meaning and intent of his letter to Attorney General Reno. It completely contradicts the interpretation urged by the State. That letter states in part:

> I'd like to inform you that at no time did I provide any type of interpretation on the content and reach of the decision passed by the Federal Supreme Court. Thus, I ratify all the words used in said correspondence. Its only objective being to clarify to Ms. Janett [sic] Reno, Attorney-General of the United States, some aspects of the Brazilian Constitutional system [47]

While some United States circuit courts have questioned whether an extraditee has standing to assert limitations on post-extradition prosecution, and other courts have declined to address the issue, no court has dismissed such a claim because an extraditee did not have standing. The only firm decisions on this issue agree that an extraditee may raise any objection the surrendering State could make, as long as that country has not waived its right to object.[48] From the entire record in this case,

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[46] *See Najohn*, 785 F.2d at 1422 (two letters from the Swiss government asking for prosecution and agreeing that the doctrine of specialty be waived); *see also United States v. Riviere*, 924 F.2d 1289, 1301 n.13 (3d Cir. 1991) ("the waiver was executed by the Dominican Attorney General contemporaneously with the extradition)."

[47] Letter from State Ministry of Justice Nelson A. Jobim to Dr. Celso Spitzcowsky [sic] Dr. Roberto B. Dias da Silva, dated February 26, 1997, Clerk's Papers at 659. English translation from original Portuguese.

[48] *See Puentes*, 50 F.3d at 17575; *Fowlie*, 24 F.3d at 1064; *Leighnor*, 884 F.2d at 389.

we cannot conclude that the United States of Brazil has said, done or implied by words, action or inaction anything which would require this Court to deny Petitioner Pang the right to make post-extradition objections to his prosecution by the State of Washington in violation of the conditions of his extradition from Brazil. We conclude that Petitioner Pang does have standing to assert limitations on his post-extradition prosecution in King County.

WAIVER

(2) *Did the United States of Brazil explicitly or implicitly waive any objection it could have made to prosecution by the State of Washington of Petitioner Pang for murder in the first degree contrary to the specific terms of the extradition order issued by the Federal Supreme Court of Brazil?*

The trial court concluded that the United States of Brazil, by not objecting when it had numerous opportunities to do so, "implicitly waived objection," thereby defeating Petitioner Pang's standing.[49] The State urges this Court to adopt that implicit waiver rationale, arguing that Justice Minister Jobim's letter of September 26, 1996 to Attorney General Reno indicates that Brazil does not object to Petitioner Pang being prosecuted for four counts of murder in the first degree. Nothing in the entire record before this Court supports such a conclusion. We reject it as being completely unsound and totally contrary to the record.

The United States of Brazil has from the outset expressed its position that Petitioner Pang should not be charged with murder in the first degree by the State of Washington. The Federal Supreme Court of Brazil fully considered and unequivocally rejected extradition of Petitioner on the murder charges as requested by the State

[49] Verbatim Report of Court's Oral Decision at 8-10.

of Washington. That position was reaffirmed when the court uncategorically rejected the appeal filed by the United States and the motion for clarification filed by the State of Washington. Despite repeated requests through diplomatic channels, Brazil has not only affirmatively denied permission to charge Petitioner with murder, but its President and Minister of Justice affirmatively declined in no uncertain terms the request of President Clinton that Brazil waive its right to object to prosecution of Petitioner Pang by the State of Washington for murder in the first degree following the extradition order.

The State's insistence that Justice Minister Jobim waived objection on behalf of Brazil to the State of Washington charging Petitioner Pang with murder distorts the facts established in this case. The letter from Minister Jobim to Attorney General Reno merely reiterated that Petitioner Pang was extradited to stand trial "for the crime of arson in the first degree, resulting in four deaths and the consequences thereof under U.S. law." [50] This is only a portion of the words used in the extradition order issued by the Federal Supreme Court of Brazil. In that same statement the Federal Supreme Court of Brazil continued its words to specifically exclude "the additional charge of four counts of first-degree murder." [51]

From a reading of the complete series of opinions from the Federal Supreme Court of Brazil it is evident beyond question that the point of disagreement between the majority and the dissenting minority was on the question whether the extradition order would exclude punishment beyond the 30-year maximum under Brazilian law or whether the order would allow the maximum punishment of life imprisonment for arson in the first degree as al-

[50] Letter from Nelson A. Jobim, Minister of State for Justice of Brazil, to Janet Reno, United States Attorney General, dated September 26, 1996.

[51] Summary of Extradition, Clerk's Papers at 323.

lowed under Washington law. There was no disagreement among the Brazilian justices on the question whether the extradition order would allow prosecution of Petitioner Pang for even a single count of murder in the first degree or any degree.[52]

We are not convinced an implied waiver, even if made, would overcome the standing of Petitioner Pang to object in this case.[53] The United States Court of Appeals for the Ninth Circuit has held that an express waiver of objection does divest an extraditee of standing.[54] We conclude from the record in this case that Brazil has not expressly consented to nor implicitly or explicitly waived objection to the State of Washington charging Petitioner with murder in the first degree. We therefore conclude that Petitioner Pang does have standing to object.

Specialty Doctrine

(3) *Does the "specialty doctrine" in international extradition law prohibit the State of Washington from prosecuting Petitioner Pang for crimes specifically excluded in the extradition order?*

The United States Court of Appeals for the Ninth Circuit has stated "We review de novo whether extradition of a defendant satisfies the doctrines of 'dual criminality' and 'specialty.' "[55] The specialty doctrine has been explained:

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[52] *See* Opinion Appendix "A." English translation from original Portuguese.

[53] *See United States v. Riviere*, 924 F.2d 1289 (3d Cir. 1991) (express waiver precluded extraditee's assertion of treaty rights).

[54] *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986).

[55] *United States v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993) (citing *United States v. Van Cauwenberghe*, 827 F.2d 424, 428 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042, 108 S. Ct. 773, 98 L. Ed. 2d 859 (1988)); *see United States v. Merit*, 962 F.2d 917 (9th Cir. 1992).

> The requested state retains an interest in the fate of a person whom it has extradited, so that if, for example, he is tried for an offense other than the one for which he was extradited, or is given a punishment more severe than one applicable at the time of the request for extradition, the rights of the requested state, as well as the person, are violated.[56]

Under international law, the "specialty doctrine" generally prohibits a requesting State from prosecuting an extraditee "for an offense other than the one for which surrender was made." [57] This doctrine "is designed to prevent prosecution for an offense for which the person would not have been extradited." [58]

" 'As a matter of international comity, "[t]he doctrine of 'specialty' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite" ' " [59] "To guarantee limited prosecution by nations seeking extradition of persons from the United States, the United States has guaranteed, pursuant to the treaty, that it will honor limitations placed on prosecution in the United States." [60]

In *United States v. Rauscher*,[61] the United States Supreme Court addressed the question whether the extra-

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[56] Restatement (Third) of the Foreign Laws of Nations, Ch. 7, at 557-58.

[57] I. A. Shearer, *Extradition in International Law* 146 (1971).

[58] Restatement (Third) of Foreign Relations Law of the United States 477 (cmt. b) (1987).

[59] *Khan*, 993 F.2d at 1373 (citing *United States v. Van Cauwenberghe*, 827 F.2d 424, 428 (9th Cir. 1987) (quoting *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir. 1986))).

[60] *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988).

[61] 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886).

dition treaty between England and the United States prohibited prosecution of the defendant for a crime other than for which he was extradited. This was the first case in which the Supreme Court recognized the specialty doctrine. In that case an American merchant ship officer had been extradited from Great Britain, under an extradition treaty, to be charged with murder of a crew member. He was subsequently convicted of assault and inflicting cruel and unusual punishment, neither of which were listed as extraditable offenses in the treaty. The Court held the defendant could be tried only for the offense "with which he is charged in the extradition proceedings, and for which he was delivered up." [62]

The Court in *Rauscher* was guided by principles of comity which prevailed in the absence of treaties, under which a receiving country would not prosecute a fugitive for any offense other than those for which the fugitive had been surrendered by the asylum country.[63] The Court rejected the argument that the treaty did not expressly limit the offenses that could be charged by the requesting country.[64] The Court reasoned that there was no indication the treaty intended to depart from principles of comity.[65]

The Supreme Court concluded that the treaty, by listing certain extraditable offenses, implicitly excluded the right of extradition for any other offenses.[66] The Court stated: "[A] person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged

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[62] *Rauscher*, 119 U.S. at 424.

[63] *See id.* at 419-21.

[64] *See id.* at 422.

[65] *See id.* at 420.

[66] *See id.* at 420.

in the proceedings for his extradition." [67] The Court based its conclusion upon the terms and history of the treaty; extradition practices of states; case law; and the writings of jurists. In part, the court considered the Revised Statutes §§ 5272, 5275, which dealt with this country's roles as both requested state and requesting state in extradition proceedings. Section 5275 is now codified in 18 U.S.C. § 3192 and differs only in that the words "crimes or offences" have been replaced with the word "offenses." It provides as follows:

> Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or the militia thereof, as may be necessary for the safekeeping and protection of the accused.[68]

In *United States v. Alvarez-Machain* the Supreme Court noted that federal statutes impose the doctrine of specialty upon all extradition treaties to which the United States is a party.[69]

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[67] *Id.* at 430.

[68] 18 U.S.C. § 3192.

[69] 504 U.S. 655, 660, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992) (citing *Rauscher*, 119 U.S. at 423).

Under *Rauscher*, for an extradited defendant to be charged with a crime, that crime must be specified in the treaty (the approval of which is within the sole discretion of the asylum state), and be included in the extradition petition (the content of which is within the sole discretion of the requesting state). The defendant has the right to "be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up." [70] "It is unreasonable that the country of the asylum should be expected to deliver up such a person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party." [71] The doctrine of specialty was not explicitly stated in the treaty between the United States and Great Britain. The court in *Rauscher* interpreted the treaty with consideration of the specialty doctrine which had previously been recognized in international law.[72]

The Court examined the treaty and the history of relations between the United States and Great Britain to determine whether the parties, in the absence of express incorporation nevertheless intended the doctrine of specialty to be part of the treaty.[73] Under *Rauscher* the specialty doctrine may be implied where a treaty is silent on the issue and there is no reason to assume the signatory nations did not abide by the principles of comity.

Petitioner Pang argues that, because the extradition order specifically excluded the charges of murder in the first degree requested by the State of Washington, under the specialty doctrine the State may not prosecute him on

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[70] *Rauscher*, 119 U.S. at 424.

[71] *Id.* at 419.

[72] *See id.*

[73] *See id.* at 411-12; *see also Alvarez-Machain*, 504 U.S. at 659 (noting how the court in *Rauscher* "carefully examined the terms and history of the treaty; the practice of nations in regards to extradition treaties; the case law from the States").

these charges. He argues that under *Rauscher* the specialty doctrine is implied in every treaty.[74]

The State argues that any limitations on post-extradition prosecution are defined only by the terms of the treaty and the doctrine of specialty applies only when it is expressly incorporated into the terms of the treaty. In determining whether there has been a violation to the specialty doctrine, courts have consistently examined the terms of the treaty for any limitations on prosecution.[75] The United States

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[74] *See Rauscher*, 119 U.S. 407.

[75] *See, e.g., United States v. Puentes*, 50 F.3d 1567, 1575 (11th Cir.) (citing Treaty on Extradition and Cooperation in Penal Matters, Apr. 6, 1973, U.S.-Uru, art. XIII, P.I.A.S. 10850), *cert. denied*, 116 S. Ct. 341 (1995); *United States v. Fowlie*, 24 F.3d 1059, 1064 n.2, 1065 (9th Cir. 1994) (citing Extradition Treaty Between U.S. and Mex., May 4, 1978, U.S.-Mex. 31 U.S.T. 5059, T.I.A.S. 9656), *cert. denied*, 115 S. Ct. 742 (1995); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994) (citing Treaty on Ertradition and Cooperation in Penal Matters, Apr. 6, 1973, U.S.-Uru, art. 13, T.I.A.S. 10850), *cert. denied*, 115 S. Ct. 938 (1995); *United States v. Khan*, 993 F.2d 1368, 1373 (9th Cir. 1993) (citing Extradition Treaty, Dec. 22, 1931, U.S.-Pak, art. 7, 47 Stat. 2124); *United States v. Levy*, 905 F.2d 326, 328 (10th Cir. 1990) (citing Extradition Treaty, June 8, 1972, U.S.-U.K. art. XII(1), 28 U.S.T. 227), *cert. denied*, 498 U.S. 1049 (1991); *Leighnor v. Turner*, 884 F.2d 385, 386 T.S. No. 354 (8th Cir. 1989) (citing Treaty Concerning Extradition, June 20, 1978, U.S.-F.R.G., 32 U.S.T. 1485, T.I.A.S. No. 9785); *United States v. Sensi*, 879 F.2d 888, 895 (D.C. Cir. 1989) (citing Extradition Treaty, June 8, 1972, U.S.-U.K., art. XII, 28 U.S.T. 227, T.I.A.S. 8468); *United States v. Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1988) (citing Extradition Treaty, June 8, 1972/Oct. 21, 1976, U.S.-U.K., art. XII, 28 U.S.T. 227, T.I.A.S. No. 8468), *cert. denied*, 489 U.S. 1027 (1989); *United States v. Cuevas*, 847 F.2d 1417, 1427 (9th Cir. 1988) (citing Treaty on Extradition, U.S.-Swiz., May 14, 1900, 31 Stat. 1928, T.S. No. 354, Art. IX), *cert. deneid*, 489 U.S. 1012 (1989); *United States v. Thirton* 813 F.2d 146, 151 (8th Cir. 1987) (citing Treaty Respecting Extradition, Feb. 15, 1939, U.S.-Monaco, 54 Stat. 1780); *United States v. Najolm*, 785 F.2d 1420, 1422 (9th Cir. 1986) (citing Treaty on Extradition, May 14, 1900, U.S.-Switz., Art. IX, 31 Stat. 1928, T.S. No. 354); *Fiocconi v. Attorney General*, 462 F.2d 475,

Court of Appeals for the Ninth Circuit observed in a recent case that "[w]e look to the language of the applicable treaty to determine the protection an extradited person is afforded under the doctrine of specialty." [76]

In this case, the doctrine of specialty is incorporated into the terms of Treaty of Extradition Between the United States of America and the United States of Brazil (Treaty) through Article XXI which provides: [77]

> A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request, nor may he be re-extradited by the requesting State to a third country which claims him, unless the surrendering State also agrees or unless the person extradited, having been set at liberty within the requesting State, remains voluntarily in the requesting State for more than 30 days from the date on which he was released. Upon such release, he shall be informed of the consequences to which his stay in the territory of the requesting State would subject him.

This provision, read in conjunction with Articles I and II, require that the crime must be enumerated in the

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481 (2d Cir.) (citing Extradition Convention between U.S.-Italy, (1868), Art. III, 15 Stat. 631), *cert. denied*, 409 U.S. 1059 (1972).

[76] *Andonian*, 29 F.3d at 1435; *accord United States v. Diwan*, 864 F.2d 715, 721 (11th Cir.) ("[T]he objective of the rule [of specialty] is to insure that the treaty is faithfully observed by the contracting parties. . . . The extradited individual, therefore, can use only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty" (citations omitted)), *cert. denied*, 492 U.S. 921 (1989).

[77] 15 U.S.T. 2093; T.I.A.S. No. 5691, Article XXI, Clerk's Papers at 58. *See* Opinion Appendix "B" for the complete text of the Treaty.

treaty and must satisfy the doctrine of dual criminality, thus incorporating the doctrine of specialty into the Treaty. Because the doctrine is codified in federal statute, 18 U.S.C. § 1392, federal law requires acceptance of the requirement of Brazil that an offense must be extraditable under its interpretation of applicable domestic and international law.

The United States Court of Appeals for the Ninth Circuit recognizes that the doctrine of specialty is embodied in all extradition treaties.[78] That court has recognized *Rauscher* as providing an "implicit rule of specialty."[79] It has also recognized that, under the doctrine of specialty, an extradited person may be prosecuted only for offenses specified in the order of extradition.[80]

The Federal Supreme Court of Brazil specifically "exclude[d] from the grant of extradition the charges of murder in the first degree."[81] The Court

> *granted extradition without any restriction as to the possibility of life imprisonment; but only on the crime of first degree arson with the results it produced (four deaths) and all the consequences thereof pursuant to United States law without however, the added charge of four counts of murder in the first-degree.*[82]

After considering the appeal for clarification from the United States, the Federal Supreme Court of Brazil unanimously denied it, stating,

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[78] *See United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1351 (9th Cir. 1991).

[79] *See id.* at 1351 n.10.

[80] *Baramdyka*, 95 F.3d at 845.

[81] Summary of Extradition, Clerk's Papers at 323.

[82] Summary of Extradition, Appeal for Clarification, Clerk's Papers at 314 (emphasis added).

> *The absence of any doubt or obscurity as regards the denial of the extradition with respect to the charges of the four crimes of murder in the first degree is demonstrated in the terms of the decision, which did not consider the facts, as described in the request, as characterizing independent crimes of arson in the first degree and murder in the first degree.*[83]

King County Superior Court Judge Jordan in his oral decision stated, "it appears to this Court reasonably clear that Brazil did not extradite for felony murder." [84] He was absolutely correct in that conclusion. But he was in error in his conclusion that Brazil had "implicitly waived" any objection to the State of Washington ignoring the order on extradition. Under the treaty and the doctrine of specialty, King County may not prosecute Petitioner Pang for any crime but arson in the first degree as specified in the extradition ruling by the Federal Supreme Court of Brazil. "The doctrine of specialty is satisfied if the extraditing country honors the limitations placed on the prosecution by the surrendering state." [85]

Extradition Treaty

(4) *Does the Extradition Treaty between the United States of America and the United States of Brazil prohibit the State of Washington from prosecuting Petitioner Pang for crimes not authorized in the extradition order?*

International law is incorporated into our domestic law.[86] Treaties are the supreme law of the land. They are binding on the states as well as the federal govern-

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[83] *Id.* (emphasis added).

[84] Reporter's Verbatim Report of Court's Oral Decision, November 12, 1996, at 4.

[85] *Andonian*, 29 F.2d at 1438.

[86] *See The Paquette Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299, 44 L. Ed. 2d 320, 328-29 (1900).

ment.[87] Courts must interpret treaties in good faith.[88] In the 1907 case of *Johnson v. Browne*[89] the United States Supreme Court stated:

> While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought, by doubtful construction of some of its provisions, to obtain the extradition of a person for one offense and then punish him for another and different offense. Especially should this be the case where the government surrendering the person has refused to make the surrender for the other offense, on the ground that such offense was not covered by the treaty.[90]

We adopt that statement as appropriate declaration of good faith which our courts must maintain in interpreting the terms and conditions of an extradition proceeding between signatory nations to a treaty.

The right "to demand and obtain extradition of an accused criminal is created by treaty."[91] The treaty must ordinarily list the offense complained of in a request for

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[87] *See* U.S. Const. art. VI, cl. 2; *Rauscher*, 119 U.S. at 418.

[88] *See Johnson v. Browne*, 205 U.S. 309, 321, 27 S. Ct. 539, 51 L.Ed. 816 (1907); Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. no. 58 (1980), 81 I.L.M. 679 (1969), *entered into force* Jan. 27, 1980, Article 31 (although the United States has not ratified this treaty, it is accepted as the authoritative guide to treaty law and practice and declaratory of customary international law, S. Exec. Doc., 92 Cong., 1st Sess. 1 (1971); Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 75 Am. J. Int'l L. 142, 147 (1981)).

[89] *Johnson*, 205 U.S. 309.

[90] *Id.* at 321.

[91] *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

extradition as an extraditable offense.[92] Additionally, under the doctrine of dual criminality, an accused person may be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both requesting and asylum states.[93] The doctrine of dual criminality is specifically incorporated into the Treaty between the United States and Brazil through Article I which states:

> Each Contracting State agrees, under the conditions established by the present Treaty and each in accordance with the legal formalities in force in its own country, to deliver up, reciprocally, persons found in its territory who have been charged with or convicted of any of the crimes or offenses specified in Article II of the present Treaty and committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article IV of the present Treaty: provided that such surrender shall take place only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his commitment for trial if the crime or offense had been there committed.[94]

Article II of the Treaty states in part:

> Persons shall be delivered up according to the provisions of the present Treaty for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following crimes or offenses:

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[92] *See id.* at 791.

[93] *See id.* at 783; *see also In re Extradition of Russell*, 789 F.2d 801, 803 (9th Cir. 1986).

[94] 15 U.S.T. 2112; T.I.A.S. No. 5691, art. I, Clerk's Papers at 50. *See* Opinion Appendix "A."

1. Murder (including crimes designated as parricide, poisoning and infanticide, when provided for as separate crimes); manslaughter when voluntary.

. . . .

7. Arson.

. . . .[95]

Article XI of the Treaty provides that:

> The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the domestic law of the requested State, and the person whose extradition is desired shall have the right to use such remedies and resources as are authorized by such law.[96]

The Federal Supreme Court of Brazil, the highest court in the United States of Brazil, has rendered its decision in good faith compliance with extradition procedures in the Treaty. "[D]etermination of whether a crime is within the provisions of an extradition treaty is within the sole purview of the requested state." [97]

We agree with the United States Court of Appeals for the Ninth Circuit in its interpretation of international treaty law. From the extensive record in this case, we cannot conclude that the Federal Supreme Court of Brazil misinterpreted its own laws in rendering its decision on extradition of Petitioner Pang under the Treaty. We conclude without question that under the Treaty, Brazil, as the requested state, has sole authority to determine whether a particular offense is extraditable.

The Treaty provides that "[a] person extradited by virtue of the present Treaty may not be tried or punished by

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[95] *Id.* art. II, at 50-52.

[96] *Id.* art. XI, at 55.

[97] *United States v. Van Cauwenberghe*, 827 F.2d 424, 429 (9th Cir. 1987) (citations omitted).

the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request." [98]

The State argues it requested Petitioner's extradition on one count of arson in the first degree and four counts of murder in the first degree and reasons there is no violation of the Treaty because Petitioner is only being prosecuted for those offenses. Petitioner Pang argues that the semantic distinction between the Treaty in this case and those limiting prosecution to offenses "for which extradition was granted" is not meaningful. Two courts have affirmed convictions on charges other than those for which extradition was granted because the express language in the treaties in those cases allowed it.

In *Fiocconi v. Attorney General,* the United States Court of Appeals for the Second Circuit denied habeas corpus relief to an extraditee who had been convicted of crimes other than those for which extradition was granted.[99] The court examined the applicable United States-Italy extradition treaty which provided that "the person . . . delivered up for the crimes enumerated . . . shall in no way be tried for any . . . crime, committed previously to that for which his . . . surrender is asked." [100] The court observed:

> If the countries had intended that the requesting government could not try the accused for any crime committed before the time of his surrender other than the crime for which he was extradited, they could

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[98] Treaty of Extradition Between the United States of America and the United States of Brazil, January 13, 1961, art. XXI, 15 U.S.T. 2093, T.I.A.S. 5691. *See* Opinion Appendix "B."

[99] 462 F.2d 475 (2d Cir.), *cert. denied,* 409 U.S. 1059 (1972).

[100] *Id.* at 481 (quoting Extradition Convention between U.S. and Italy, 1868, Art. III, 15 Stat. 631).

have accomplished this by adopting one of the standard clauses to that end.[101]

In *United States v. Sensi* the defendant was convicted of charges other than those for which he was extradited.[102] The United States Court of Appeals for the District of Columbia upheld the convictions for the reason that the United States-United Kingdom Treaty only prohibited prosecution for offenses other than those "established by the facts in respect of which his extradition has been granted." [103] The court reasoned that, although the crimes charged were not those for which extradition was granted, the charges were based upon the same underlying facts and that therefore there was no treaty violation.[104]

The United States Court of Appeals for the Ninth Circuit in *United States v. Khan* ruled to the contrary.[105] The defendant was charged with conspiring to import drugs and with using a communication facility in furtherance of the conspiracy. The United States requested his extradi-

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[101] *Fiocconi* 462 F.2d at 481 (citing 1 John B. Moore, *A Treatise in Extradition and Interstate Rendition* §§ 148-49, at 194-96 (1891)); *see e.g.*, Extradition Treaty, Mar. 19, 1924, U.S.-Bulg., art. IV, 43 Stat. 1886 ("No person shall be tried for any crime or offense other than that for which he was surrendered."); Treaty Providing for the Extradition of Fugitives from Justice, Apr. 17, 1900, U.S.-Chile, art. VIII, 32 Stat. 1850 ("No person surrendered . . . shall . . . be triable or tried or be punished for any crime of offense committed prior to his extradition, other than that for which he was delivered up . . . ."); Treaty on Extradition, Dec. 3, 1971, U.S.-Can. art. 12, 27 U.S.T. 983 ("A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted . . . .").

[102] 879 F.2d 888 (D.C. Cir. 1989).

[103] *Id.* at 895 (quoting Extradition Treaty, June 8, 1972, U.S.-U.K., art XII, 28 U.S.T. 227, T.I.A.S. 8468).

[104] *Id.* at 895-96.

[105] 993 F.2d 1368 (9th Cir. 1993).

tion from Pakistan for trial on both charges. The Pakistani Commissioner directed that the defendant be "surrendered over to the authorities in the U.S.A. for trial under the relevant American Law," but made no direct reference to the underlying charges.[106] Other documents in the case referred to the conspiracy charge, but not to the communication facility charge. The court held that because Pakistan did not unambiguously agree to extradite the defendant on the communication facility charge, his conviction on that charge must be reversed.[107] The court distinguished *Sensi*, pointing out that the treaty language in that case did not limit prosecution to those offenses for which extradition was granted. The court noted by contrast that "[t]he operative treaty in [the] case contain[ed] the following language: 'A person surrendered can in no case be [prosecuted] . . . for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place." [108]

(5) Is the State of Washington obliged to follow the decision of the Federal Supreme Court of Brazil which ruled that, as a condition for extraditing Petitioner Pang the State, he can be prosecuted only "for the crime of arson in the first degree resulting in four deaths. . . without the additional charge of four counts of first degree murder"?

Under all the established facts in this case and the application of international law, treaty law, United States law, Washington law, and common logic, we must give good faith recognition to the lawful determination of the Federal Supreme Court of Brazil, the highest court of that sovereign democracy, that Petitioner Martin Shaw Pang was extradited only for prosecution in the State of Wash-

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[106] *Id.* at 1374.

[107] *Id.* at 1375.

[108] *Id.* at 1374 (some alteration in original) (quoting Extradition Treaty, Dec. 22, 1931, art. 7, 47 Stat. 2124).

ington for the crime of arson in the first degree, resulting in four deaths, but not for prosecution for the four charges of murder in the first degree. We therrefoe answer the question in the affirmative.

SUMMARY AND CONCLUSIONS

(1) Petitioner Pang has standing to object to violation by the State of Washington of the terms of the order on extradition issued by the Federal Supreme Court of Brazil. The only firm decisions on the issue of standing argree that an extraditee may raise any objection the surrendering State could make, as long as that country has not waived its right to object. From the entire record in this case, we cannot conclude that the United States of Brazil has said, done or implied by words, action or inaction, anything which would require this Court to deny Petitioner Pang the right to make post-extradition objections to his prosecution by the State of Washington in violation of the conditions of his extradition from Brazil.

(2) The United States of Brazil did not explicitly or implicitly waive any objection it could have made to prosecution by the State of Washington of Petitioner Pang for murder in the first degree contrary to the specific terms of the extradition order issued by the Federal Supreme Court of Brazil. We are not convinced an implied waiver, even if made, would overcome the standing of Petitioner Pang to object in this case. We conclude from the record in this case that Brazil has not expressly consented to nor implicitly or explicitly waived objection to the State of Washington charging Petitioner with murder in the first degree. We therefore conclude that Petitioner Pang does have standing to object.

(3) The "doctrine of specialty" in international extradition law prohibits the State of Washington from prosecuting Petitioner Pang for crimes specifically excluded in the extradition order. In this case the doctrine is incorporated

into the Treaty through Article XXI. The doctrine of specialty is satisfied if the extraditing country honors the limitations placed on the prosecution by the surrendering state.

(4) The Extradition Treaty between the United States of America and the United States of Brazil prohibits the State of Washington from prosecuting Petitioner Pang for crimes not authorized in the extradition order. Good faith must be maintained in interpreting the terms and conditions of an extradition proceeding between signatory nations to a treaty. We conclude that under the Treaty, Brazil, as the requested state, has sole authority to determine whether a particular offense is extraditable.

(5) The State of Washington is obligated to follow the decision of the Federal Supreme Court of Brazil which ruled that, as a condition for extraditing Petitioner Pang to the State of Washington, he can be prosecuted only "for the crime of arson in the first degree resulting in four deaths . . . . without the additional charge of four counts of first degree murder."

We reverse the King County Superior Court which denied the motion of Petitioner Martin Shaw Pang to dismiss or sever four counts of murder in the first degree from one count of arson in the first degree. The trial court erroneously concluded that the record in this case establishes Brazil Minister of Justice Nelson A. Jobim implictly waived the provisions of Article XXI of the Treaty, thus depriving Petitioner Pang of standing to assert a violation of Article XXI and allowing the State of Washington to proceed to trial on all counts, including the four counts of murder in the first degree. The State may proceed to trial only on Count I of the second amended information which charges Petitioner Martin Shaw Pang with the crime of arson in the first degree alleged to have been committed in King County, Washington on or about January 5, 1995.

/s/ Smith, J.

/s/ Madsen, J.

/s/ Sanders, J.

/s/ Guy, J.

/s/ Johnson, J.

DURHAM, C.J. (dissenting)—Four Seattle firefighters died while fighting a fire at Pang's parents' warehouse. After fire investigators determined that the fire had been deliberately set, a fugitive warrant was issued for Martin Pang, who fled to Brazil. Pang was charged with first degree arson and four counts of first degree felony murder, and the United States requested that Brazil extradite him on these charges. However, the Brazilian Supreme Court determined that Pang's alleged act would be classified in Brazil as the single crime of aggravated arson. Therefore, Brazil granted extradition on the arson count alone.

The question before us is whether the State may prosecute Pang for the felony murder given that Brazil extradited him only for arson. The plain language of the United States/Brazil extradition treaty expressly permits prosecution for offenses included in the extradition request. Yet, the majority erroneously concludes that a doctrine of international law called specialty prohibits the State from prosecuting Pang for anything other than the arson count for which he was extradited. The majority's conclusion is based on a misunderstanding of the specialty doctrine and is inconsistent with the vast weight of authority, which holds that the scope of any specialty limitations on prosecution is determined solely by the language of the applicable treaty.

Unless Pang is prosecuted for murder, he cannot be punished for the firefighters' deaths because the codification of the "real facts doctrine" in our state sentencing laws excludes from sentencing consideration facts that establish the elements of a more serious crime. Thus, the majority's decision not only violates the State's unambiguous rights under the treaty, but also fails to effectuate Brazil's expectation that Pang will be held accountable for the deaths he may have caused.

ANALYSIS

THE SPECIALTY DOCTRINE

Absent a treaty, the obligation to surrender a fugitive hav never been recognized as a principle of international law.[1] In order to ensure that criminal fugitives are brought to justice, many nations, including the United States, have entered into extradition treaties to facilitate the surrender and prosecution of fugitives. In order to guard against indiscriminate prosecution, particularly of political crimes, extradition treaties usually include provisions that limit prosecution for separate crimes unrelated to the extradition request.[2] Such limitations on prosecution are collectively referred to as the "specialty doctrine" and serve to discourage nations from requesting extradition for one offense as a ruse for obtaining jurisdiction on a different offense. However, the precise form of the specialty doctrine varies because nations have negotiated different limits on post-extradition prosecution.

For example, some extradition treaties prohibit prosecution for any offenses other than those for which extradition is specifically *granted*. In this most restrictive version of the specialty doctrine, the asylum country dictates the scope of permissible prosecution by its grant of extradition. It was this version of the rule that was applied in the Supreme Court's first specialty doctrine case, *Rauscher*, and the rule that the majority erroneously suggests is implied in every extradition treaty to which the United States is a party.

Although some nations adhere strictly to this version of specialty in all extradition matters, "[i]n other states, including the United States, the prosecution may go for-

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[1] *United States v. Raucher*, 119 U.S. 407, 411-12, 7 S. Ct. 234, 30 L. Ed. 425 (1886); *Factor v. Laubenheimer*, 290 U.S. 276, 287, 54 S. Ct. 191, 78 L. Ed. 315 (1933).

[2] *See Fiocconi v. Attorney Gen.*, 462 F.2d 475, 481 (2d Cir. 1972).

ward if it is based on the same facts as those set forth *in the request for extradition.*"[3] Nations adopting this variation of the specialty doctrine retain control over the scope of prosecution rather than allowing the asylum country to dictate its scope. It is this version of the specialty doctrine that is expressly incorporated into the United States/Brazil extradition treaty: "A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that *which gave rise to the request.*"[4] But both versions of the rule accomplish the purpose of the specialty doctrine: protection against indiscriminate prosecution of separate crimes unrelated to the extradition request.

In suggesting that the specialty doctrine must be implied into the United States/Brazil extradition treaty, the majority assumes, without support, that the specialty doctrine is solely defined as limiting prosecution to offenses for which extradition was granted. But, as the First Circuit Court of Appeals pointed out:

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[3] Restatement (Third) of Foreign Relations Law of the United States § 477 cmt. a (1987) (emphasis added); *accord* David B. Sweet, Annotation, *Application of Doctrine of Specialty to Federal Criminal Prosecution of Accused Extradited from Foreign Country*, 112 A.L.R. Fed. 473, 517 (1993) ("[I]n order to avoid a violation of the doctirne of specialty . . ., the prosecution must be based upon the same evidence, facts, or acts as set forth *in the request for extradition.*") (emphasis added); Mary-Rose Papandrea, Comment, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship between the Individual and the Sovereign*, 62 U. Chi. L. Rev. 1187, 1187 (1995) ("The doctrine of specialty dictates that once the asylum state extradites an individual to the requesting state under the terms of an extradition treaty, that person can be prosecuted only for the crimes specified *in the extradition request.*") (emphasis added).

[4] Treaty of Extradition Between the United States of America and the United States of Brazil, Jan. 13, 1961, U.S.-Braz., art. XXI, 15 U.S.T. 2093 (emphasis added).

> Specialty . . . is not a hidebound dogma, but must be applied in a practical, commonsense fashion. Thus, obeisance to the principle of specialty does not require that . . . the prosecution always be limited to specific offenses enumerated in the surrendering state's extradition order . . . .[5]

In the present case, the specialty doctrine does not need to be implied for it is already expressly incorporated into the United States/Brazil extradition treaty, albeit in a form that is not conductive to the majority's desired result. Thus, the question is not whether the specialty doctrine should be implied in the United States/Brazil extradition treaty, but whether this court can imply additional limitations on prosecution beyond the express specialty provisions agreed upon by the United States and Brazil.

A COURT MAY NOT IMPLY ADDITIONAL LIMITATIONS ON PROSECUTION IN THE FACE OF EXPRESS LIMITATIONS INCLUDED IN THE TREATY

The majority relies on *United States v. Rauscher*, 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886) for the proposition that an implied term of every extradition treaty is that an extradited fugitive may be prosecuted only for crimes for which he was surrendered. Yet, the majority, by its own analysis, demonstrates that *Rauscher* is not applicable in the present case.

In *Rauscher*, an American merchant ship officer who was accused of murdering a crewmember fled to Great Britain. The United States, pursuant to its first extradition treaty, requested the fugitive's extradition for murder; the request was subsequently granted. The defendant, however, was subsequently tried and convicted of inflicting cruel and unusual punishment instead of murder. The Supreme Court vacated the sentence and held that the

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[5] *United States v. Saccoccia*, 58 F.3d 754, 767 (1st Cir. 1995) (citations omitted).

defendant could be tried only for an offense "with which he is charged in the extradition proceedings and for which he was delivered up . . . ." [6] Moreover the Court rejected the State's argument that the treaty's silence on the issue indicated that the United States and Great Britain intended that there be no limitations on prosecution. Instead, the Court implied such a limitation into the treaty.

At first blush, it might appear as though the Court had announced a rule that such a limitation is implied in all extradition treaties as a matter of course. Yet, the Court strictly limited its holding as an interpretation of the extradition treaty with Great Britain:

> "The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express or implied, of the treaty." [7]

Consistent with the rule that the treaty defines the scope of the specialty doctrine, the Court initially looked to the text of the treaty itself.[8] It was only after determining that the treaty was silent on this issue that the Court looked beyond the express treaty terms to determine whether the parties intended to limit the scope of post-extradition prosecution. Thus, it was only in the absence of express specialty provisions that the Court turned to the comity principles in general, the specific history between the United States and Great Britain on this issue in particular, and the statutory references to limitations on prosecution, in order to resolve this question.

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[6] *Rauscher*, 119 U.S. at 424.

[7] *Rauscher*, 119 U.S. at 429 (quoting *Commonwealth v. Hawes*, 13 Bush 697 (Ky. 1878)).

[8] *Rauscher*, 119 U.S. at 410-11.

The majority correctly identifies a treaty's silence on the issue as an essential prerequisite for the Court to inquire beyond the language of the treaty itself. "The Court examined the treaty and the history of relations between the United States and Great Britain to determine whether the parties, *in the absence of express incorporation*, nevertheless intended the doctrine of specialty to be part of the treaty." [9] Crucial to the Court's decision was the fact that the very issue had been the subject of much dispute between the nations, with Great Britain making very clear that it expected that the scope of prosecution would be limited by the grant of extradition.[10] The Court also looked to a statute, now codified at 18 U.S.C. § 3192, that authorizes the President to provide for an extradited fugitive's transportation and safekeeping "until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition." [11] Yet, the court resorted to this language only to resolve "any doubt upon this *construction of the treaty*." [12]

Thus, *Rauscher* stands for the proposition that a court's overriding task is to determine what the signatory nations to the extradition treaty intended to include in the way of limitations on prosecution. Only when the text of the treaty fails to provide expressly for such limitations is the court then authorized to look beyond the treaty. Lastly,

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[9] Majority at 62-63 (emphasis added); *see also United States v. Alvarez-Machain*, 504 U.S. 655, 659, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992) (noting how the *Rauscher* court "carefully examined the terms and history of the treaty").

[10] *Rauscher*, 118 U.S. at 415; *see also Fiocconi v. Attorney Gen.*, 462 F.2d 475, 480 (2d Cir. 1972) (observing that the *Rauscher* Court had concluded based on Great Britain's prior objections that Great Britain had interpreted the treaty as prohibiting prosecution for crimes other than those for which extradition was granted).

[11] *Rauscher*, 119 U.S. at 423 (quoting United States Rev. Stat. § 5275).

[12] *Rauscher*, 119 U.S .at 423 (emphasis added).

when there is evidence that the signatory nations expected that prosecution would be limited to charges for which surrender is granted, the court may then imply this term into the treaty.

Curiously, the majority concedes that *Rauscher* authorizes courts to imply prosecution limitations only when the treaty fails to provide expressly for such limitations:

> Under *Rauscher* the specialty doctrine may be implied where a treaty is silent on the issue and there is no reason to assume the signatory nations did not abide by the principles of comity.[13]

Indeed, the majority must concede this point. Were it the case that *Rauscher* prohibits the prosecution of any extradited fugitive for offenses other than those for which extradition was granted, the majority would need to explain, and indeed has failed to offer any explanation for, the numerous circuit court decisions upholding such convictions against alleged specialty doctrine violations.[14]

Unlike the treaty at issue in *Rauscher*, most United States extradition treaties, including the one with Brazil, now expressly define the limits of post-extradition prosecution. Again, the majority concedes that "[i]n determining whether there has been a violation to the specialty doctrine, courts have consistently examined the terms of the

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[13] Majority at 63.

[14] *See, e.g., United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); *United States v. Riviere*, 924 F.2d 1289 (3d Cir. 1991), *Leighnor v. Turner*, 884 F.2d 385 (8th Cir. 1989); *United States v. Sensi*, 879 F.2d 888 (D.C. Cir. 1989); *United States v. Levy*, 905 F.2d 326, 328 (10th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991); *United States v. Diwan*, 864 F.2d 715 (11th Cir. 1989); *United States v. Kaufman*, 858 F.2d 994 (5th Cir. 1988); *United States v. Cuevas*, 847 F.2d 1417, 1427 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986); *Fiocconi v. Attorney Gen.*, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

treaty for any limitations on prosecution." [15] Indeed, the majority cites a formidable list of federal extradition cases in which the courts, rather than implying limitations into the applicable treaties, had confined themselves to the specialty doctrine as expressly provided for in the treaties at issue.[16]

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[15] Majority at 63.

[16] Majority at 63 n.75. *See, e.g., United States v. Baramdyka*, 95 F.3d 840, 845 n.3 (9th Cir. 1996) (citing Treaty Providing for the Extradition of Fugitives from Justice, Apr. 17, 1900, U.S.-Chile, art. VII, 32 Stat. 1850), *cert. denied*, 117 S. Ct. 1282 (1997); *United States v. Puentes*, 50 F.3d 1567, 1575 (11th Cir.) (citing Treaty on Extradition and Cooperation in Penal Matters, Apr. 6, 1973, U.S.-Uru., art. XIII, P.I.A.S. 10850), *cert. denied*, 116 S. Ct. 341 (1995); *United States v. Fowlie*, 24 F.3d 1059, 1064 n.2, 1065 (9th Cir. 1994) (citing Extradition Treaty Between the United States and Mexico, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059), *cert. denied*, 115 S .Ct. 742 (1995); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994) (citing Treaty on Extradition and Cooperation in Penal Matters, Apr. 6, 1973, U.S.-Uru., art. 13, T.I.A.S. 10850), *cert. denied*, 115 S. Ct. 938 (1995); *United States v. Khan*, 993 F.2d 1368, 1373 n.4 (9th Cir. 1993) (citing Extradition Treaty Dec. 22, 1931, U.S.-Pak., art. 7, 47 Stat. 2124); *United States v. Levy*, 905 F.2d 326, 328 (10th Cir. 1990) (citing Extradition Treaty, June 8, 1972, U.S.-U.K., art. XII(1), 28 U.S.T. 227), *cert. denied*, 498 U.S. 1049 (1991); *Leighnor v. Turner*, 884 F.2d 385, 386 (8th Cir. 1989) (citing Treaty Concerning Extradition, June 20, 1978, U.S.-F.R.G., 32 U.S.T. 1485); *United States v. Sensi*, 879 F.2d 888, 895 (D.C. Cir. 1989) (citing Extradition Treaty, June 8, 1972, U.S.-U.K., art. XII, 28 U.S.T. 223); *United States v. Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1988) (citing Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972/Oct. 21, 1976, U.S.-U.K., art. XII, 28 U.S.T. 227) *cert. denied*, 489 U.S. 1027 (1989); *United States v. Cuevas*, 847 F.2d 1417, 1427 (9th Cir. 1988) (citing Treaty on Extradition, U.S.-Switz., art. IX, May 14, 1900, 31 Stat. 1928, T.S. No. 354), *cert. denied*, 489 U.S. 1012 (1989); *United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987) (citing Treaty Respecting Extradition, Feb. 15, 1939, U.S.-Monaco, 54 Stat. 1780); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986) (citing Treaty on Extradition, May 14, 1900, U.S.-Switz., art. IX, 31 Stat. 1928); *Fiocconi v. Attorney Gen.*, 462 F.2d 475, 481 (2d Cir.)

The majority, having identified an overwhelming number of cases in which the courts confined their specialty doctrine analysis to the express limitations in the relevant treaties, fails to offer a single case in which a court implied prosecution limitations beyond the express limitations included in the relevant treaty. This failure is understandable since it is well settled that the only limitations on post-extradition prosecution are those contained in the applicable extradition treaty. "To determine the nature and extent of the right we must look to the treaty which created it." [17]

Although the majority is correct that international law is incorporated into domestic law,[18] "extradition is 'not uniformly recognized as part of customary international law." [19] "[B]ecause United States extradition practice is based solely on the existence of a treaty," the Supreme Court has rejected the suggestion that extradition cases are governed by customary international law and has "limited the practice to a strict interpretation of the applicable treaty." [20]

(citing Extradition Convention, 1868, U.S.-Italy, art. III, 15 Stat. 631), *cert. denied*, 409 U.S. 1059 (1972)).

[17] *Factor v. Laubenheimer*, 290 U.S. 276, 287, 54 S. Ct. 191, 78 L. Ed. 315 (1933); *accord United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994) ("We look to the language of the applicable treaty to determine the protection an extradited person is afforded under the doctrine of specialty."), *cert. denied*, 115 S. Ct. 938 (1995).

[18] *See* majority at 67.

[19] Eric P. Wempen, Note, *United States v. Puentes: Re-Examining Extradition Law and the Specialty Doctrine*, 1 J. Int'l Legal Stud. 151, 153 (1995) (quoting 1 M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 319 (2d rev. ed. 1987)).

[20] M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 404-05 (3d rev. ed. 1996).

This view comports with Brazil's understanding with respect to any limitations on prosecution:

> [L]egally binding international acts are the only legal instruments capable of binding two or more sovereign States together. Thus, provided that the terms of the Treaty of Extradition . . . are respected, it will be incumbent upon the justice system of the United States of America to establish a suitable punishment for the crime of arson in the first degree, resulting in four deaths and the consequences thereof, under U.S. law.[21]

Thus, the question of whether the State may prosecute Pang for felony murder depends on the express specialty provisions of the United States/Brazil extradition treaty.

THE UNITED STATES/BRAZIL EXTRADITION TREATY PROHIBITS PROSECUTION ONLY FOR CHARGES THAT ARE NOT INCLUDED IN THE EXTRADITION REQUEST

The United States/Brazil extradition treaty provides that: "A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that *which gave rise to the request* . . . ." [22] "[T]reaties are to be interpreted in accordance with the plain meaning of the words." [23] The State requested Pang's extradition on arson and first degree felony murder charges arising out of his act of intentionally setting a fire that resulted in death. It is undisputed that this act is an extraditable offense. Since Pang is not

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[21] Letter from Nelson A. Jobim, Minister of State for Justice, Braz., to Janet Reno, Att'y Gen., U.S. (Sept. 26, 1996).

[22] Treaty of Extradition Between the United States of America and the United States of Brazil, Jan. 13, 1961, U.S.-Braz., art. XXI, 15 U.S.T. 2093 (emphasis added).

[23] Bassiouni, *supra*, at 411.

being prosecuted for any offenses other than those that gave rise to the request for extradition, the State's prosecution of Pang for murder does not violate the United States/Brazil extradition treaty and fully complies with the express limitations negotiated by the United States and Brazil.

Giving effect to the plain language of the treaty and refusing to imply additional limitations finds ample case support. The majority itself concedes that two circuit court decisions have affirmed convictions on charges other than those for which extradition was granted based on the express language of the treaties at issue.[24] The majority never explains how these cases could have been decided consistent with a rule that purportedly prohibits such prosecutions in every extradition case.

For example, in *Fiocconi* the defendants were extradited from Italy to the United States on charges of conspiring to import narcotics. They were later additionally charged and convicted of substantive narcotics crimes. They appealed their convictions, arguing that under *Rauscher* there was an implicit prohibition against prosecution for charges other than the conspiracy charge for which they were extradited. In upholding their convictions the circuit court looked to the United States/Italy extradition treaty, which provided, much like the United States/Brazil extradition treaty, that: "the person . . . delivered up for the crimes enumerated . . . shall in no case be tried for any . . . crime, committed previously to that for which his . . . surrender *is asked*." [25] The court observed:

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[24] Majority at 72-74 (discussing *Fiocconi v. Attorney Gen.*, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972) and *United States v. Sensi*, 879 F.2d 888 (D.C. Cir. 1989)).

[25] *Fiocconi*, 462 F.2d at 481 (quoting Extradition Convention, 1868, U.S.-Italy, art. III, 15 Stat. 631) (emphasis added) (omissions in original).

> If the countries had intended that the requesting government could not try the accused for any crime committed before the time of his surrender other than the crime *for which he was extradited*, they could have accomplished this by adopting one of the standard clauses to that end.[26]

In doing so, the court expressly rejected the suggestion that under *Rauscher* greater limitations on prosecution may be implied in the face of express treaty limitations.

Another example is *United States v. Sensi*, 879 F.2d 888 (D.C. Cir. 1989), in which the defendant was convicted of charges other than those for which he was extradited. The court upheld the convictions on the basis that the treaty prohibited prosecution only for offenses other than those "*established by the facts*" in respect of which his extradition has been granted."[27] The court acknowledged that the crimes charged were not those for which extradition was granted. The crimes were based, however, on the same underlying facts and, therefore, complied with the specialty provisions in the treaty. Thus, there was no violation of the specialty doctrine.[28] Similarly, had the United States and Brazil intended to limit prosecution of fugitives to crimes for which the asylum country agrees to extradite, they could have used language to that end. Such limitation is included in many of our extradition treaties.[29]

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[26] *Fiocconi*, 462 F.2d at 481 (citing 1 John B. Moore, *A Treatise on Extradition and Interstate Rendition* §§ 148-49, at 194-96 (1891)).

[27] *Sensi*, 879 F.2d at 895 (quoting Extradition Treaty, June 8, 1972, U.S.-U.K., art. XII, 28 U.S.T. 233) (emphasis altered).

[28] *Sensi*, 879 F.2d at 895-96.

[29] *See e.g.*, Extradition Treaty, Mar. 19, 1924, U.S.-Bulg., art. IV, 43 Stat. 1886 ("No person shall be tried for any crime or offense other than that *for which he was surrendered.*") (emphasis added); Treaty Providing for the Extradition of Fugitives from

Indeed, the majority cites only a single post-*Rauscher* case in which a court held that a fugitive cannot be prosecuted for offenses other than those for which extradition was granted. Yet, that case was based on the express language of the treaty, which included just such a limitation. In *United States v. Khan*, 993 F.2d 1368 (9th Cir. 1993), the United States requested that Pakistan extradite a fugitive charged with conspiracy to import heroin and with using a communication facility to facilitate the conspiracy. Pakistan directed that the defendant could be "surrendered . . . for trial under the relevant American Law," [30] yet the Pakistani extradition materials referred only to the conspiracy charge.[31] The court held that because Pakistan did not unambiguously agree to extradite the defendant on the communications facility charge, the specialty doctrine had been violated and the conviction on that charge should be reversed.[32] Yet, the court did so because "[t]he operative treaty in this case contains the following language: 'A person surrendered can in no case be [prosecuted] . . . for any other crime or offense, or on account of any other matters, than those *for which the extradition shall have taken place.*' " [33] The court acknowledged that the *Sensi* court had held that the spe-

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Justice, Apr. 17, 1900, U.S.-Chile, art. VIII, 32 Stat. 1850 ("No person surrendered . . . shall . . . be triable or tried or be punished for any crime or offense committed prior to his extradition, other than that *for which he was delivered up* . . . .") (emphasis added); Treaty on Extradition Between the United States of America and Canada, Dec. 3, 1971, U.S.-Can., art. 12, 27 U.S.T. 983 ("A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that *for which extradition has been granted* . . . .") (emphasis added).

[30] *Khan*, 993 F.2d at 1374.

[31] *Khan*, 993 F.2d at 1373.

[32] *Khan*, 993 F.2d at 1375.

[33] *Khan*, 993 F.2d at 1374 (emphasis adedd) (alteration in original).

cialty doctrine is satisfied as long as the defendant is charged with crimes arising out of the same facts for which his extradition was granted. However, the court clarified that that holding was based on the more expansive version of the specialty doctrine expressly incorporated into the treaty at issue in that case.[34]

Thus, an extraditee may challenge his prosecution for crimes other than those for which extradition was granted when the express specialty provisions limit prosecution to those offenses. When the extradition treaty expressly provides for lesser protection, however, the extraditee may assert only the limits of any rights as expressed in the treaty. Since the United States requested that Pang be extradited on four felony murder counts as well as arson, and the extradition treaty with Brazil limits the offenses that may be prosecuted only to those "which gave rise to the request," there is simply no violation of the treaty terms.

A GOOD FAITH READING OF THE UNITED STATES/BRAZIL EXTRADITION TREATY IS CONSISTENT WITH THE PLAIN MEANING OF THE EXPRESS SPECIALTY TERMS

I agree with the majority that we must interpret treaties in good faith.[35] However, the *Johnson* Court's admonition that we construe extradition treaties in good faith is fully met by giving effect to the plain language of the United States/Brazil extradition treaty.

In *Johnson*, the defendant was indicted on federal charges of fraud and conspiracy to commit fraud; yet, the United States proceeded upon only the conspiracy charge. After the defendant was convicted, he fled to Canada and the United States requested his extradition.

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[34] *Khan*, 993 F.2d at 1374.

[35] *See* Majority at 68 (quoting *Johnson v. Browne*, 205 U.S. 309, 321, 27 S. Ct. 539, 51 L. Ed. 816 (1907)).

Canada refused to extradite, having determined that conspiracy to commit fraud was not an extraditable offense. The United States recharged the substantive fraud count, requested extradition for that offense, and Canada extradited the fugitive. The United States then imprisoned the defendant for the conspiracy conviction. In affirming a lower court order discharging the defendant, the Supreme Court emphasized that an extradition treaty:

> should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for *another* and *different* offense.[36]

The Court was rightly concerned with the government's blatant manipulation of the extradition process to obtain extradition for one offense as a ruse for obtaining jurisdiction for another that "is *entirely different* from the one for which he was extradited." [37] As discussed earlier, this is the unifying purpose underlying the various versions of the specialty doctrine.

In the present case, however, the United States requested and Brazil granted extradition for the same criminal act: the intentional burning of a building that resulted in death. The majority mistakenly assumes that the relevant inquiry is whether the two nations criminalize the act in the same way. Yet, the Supreme Court has made clear that:

> The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.[38]

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[36] *Johnson*, 205 U.S. at 321 (emphasis added).

[37] *Johnson*, 205 U.S. at 316 (emphasis added).

[38] *Collins v. Loisel*, 259 U.S. 309, 312, 42 S. Ct. 469, 66 L. Ed. 956 (1922).

Extradition treatises universally recognize this distinction.[39]

Thus, allowing the State to prosecute Pang for murder does not find us engaging in "doubtful construction" in order to allow prosecution for "another and separate" offense from that for which Pang was extradited. Pang is accused of intentionally setting a fire that resulted in death. Under both Washington and Brazilian law this act is criminal and is more severely punished than simple arson because of the resulting death. Although the act is differently codified in the two countries, as *Collins* makes clear, the dispositive inquiry is whether the act is criminal in both jurisdictions. Therefore, giving effect to the plain meaning of the United States/Brazil extradition treaty does not violate our obligation to construe treaties in good faith.

THE "REAL FACTS" DOCTRINE PROHIBITS THE TRIAL COURT FROM CONSIDERING THE DEATHS AS AGGRAVATING FACTORS IN SENTENCING

The majority attempts to mitigate the injustice of its decision with the suggestion that, whether or not Pang is convicted for the felony murders, the trial court could depart from the standard range arson sentence and impose the statutory maximum of life imprisonment.[40] The majority's unstated assumption is that the firefighters' deaths could be used as aggravating factors justifying the imposition of an exceptional sentence. Indeed, as the

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[39] *See* Geoff Gilbert, *Aspects of Extradition Law* 106 (1991) ("It is the facts of the case that are all important. . . . [S]pecialty allows the fugitive to be prosecuted for any charge made out by the facts on which surrender was ordered."); I. A. Shearer, *Extradition in International Law* 146 (1971) ("[T]he only question is whether the *acts* constituting the offense charged would, if committed in the requested State, constitute *an* offense (not necessarily *the* offense charged) by the law of that State and made extraditable in the treaty.) (emphasis in original).

[40] Majority at 49-50.

majority points out, the Brazilian Supreme Court assumed that Pang could be as severely punished whether the firefighters' deaths served as the basis for an exceptional arson sentence or separate felony murder sentences.[41]

However, despite the trial court's discretion to depart from the standard range based on the presence of aggravating circumstances, this discretion is sharply limited by the "real facts doctrine." As Justice Smith pointed out in *State v. Johnson*, 124 Wn.2d 57, 71 n.33, 873 P.2d 514 (1994): "The 'real facts' concept of RCW 9.94A-.370(2) excludes consideration of either uncharged crimes or crimes charged but later dismissed."[42] RCW 9.94A-.370(2) provides, in part:

> Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for in RCW 9.94A.390(2)(c), (d), (f), and (g).[43]

In the present case, the arson deaths cannot be used to depart from the standard range because they establish an essential element of first degree felony murder.[44] And

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[41] *See* Majority at 50.

[42] *Accord State v. Houf*, 120 Wn.2d 327, 332, 841 P.2d 42 (1992); *State v. McAlpin*, 108 Wn.2d 458, 466, 740 P.2d 824 (1987).

[43] RCW 9.94A.390 was amended by Laws of 1996, ch. 248, § 2 and by Laws of 1996, ch. 121, § 1 changing subsection (2)(c), (d), (f), and (g) to subsection (2)(d), (e), (g), and (h) respectively. These statutory exceptions, which are for certain major economic offenses, violations of the Uniform Controlled Substances Act, sexual abuse, or domestic violence, would not apply in the present case.

[44] A person is guilty of murder in the first degree when:

. . .

(c) He or she commits or attempts to commit the cirme of . . . (4) arson in the first or second degree . . . and in the course of or in furtherance of such crime or in immediate flight there-

there can be no dispute that felony murder is both a separate and more serious crime since it is precisely because Washington penalizes Pang's alleged act as two separate crimes that we are deciding this case at all. With the murder charges dismissed and the trial court's inability to otherwise consider the deaths, the trial court will have no choice but to enter a standard range sentence for first degree arson, which, as the majority points out, would be approximately two years in Pang's case.[45]

CONCLUSION

The majority's decision to dismiss the murder charges defeats the very purpose of extradition:

> The law of extradition is . . . founded upon the broad principle that it is to the interest of civilized communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.

Mary-Rose Papandrea, Comment, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship between the Individual and the Sovereign*, 62 U. Chi. L. Rev. 1187, 1192 (1995) (quoting *In re Arton*, 1 QB 108, 111 (1896)). Yet, under the majority's holding, the deaths of four innocent victims will go unpunished, even though the laws of both Brazil and Washington recognize arson resulting in death as a more serious crime than arson alone. Thus, rather than furthering the ends of justice, the majority rewards Pang's calculated

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> from, he or she, or another participant, causes the death of a person other than one of the participants
>
> . . . .

RCW 9A.32.030(1)(c).

[45] Majority at 49 (citing RCW 9.94A.310).

flight and ensures that neither nation's will is done by immunizing Pang from any liability for the deaths he may have caused. Because Pang's prosecution for murder would be wholly consistent with both our treaty obligations toward Brazil and the overwhelming weight of authority, Pang should stand trial for murder and arson.

/s/ Durham, C.J.

/s/ Dolliver, J.

/s/ Talmadge, J.

ALEXANDER, J. (concurring in dissent)—I am in complete agreement with the chief justice's conclusion in dissent that Martin Pang should stand trial for four counts of first degree murder and one count of arson. I write this concurrence simply to express my view that the dissent and majority opinions should not speculate on whether or not the real facts doctrine would preclude the trial judge from imposing a sentence on Pang for first degree arson that would exceed a standard range sentence for the offense. In my view, it is entirely inappropriate for this court to pass judgment on the propriety of a sentence that has not yet and may never be imposed. Sentencing bridges need to be crossed only if and when an individual is convicted of an offense. Any speculation about the validity of a sentence that has not or may never be imposed is dicta of the first order and should not be a part of either the majority or dissenting opinion.

/s/ Alexander, J.

APPENDIX B

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

King County Cause
No. 95-1-00473-0

STATE OF WASHINGTON,
Plaintiff,

vs.

MARTIN PANG,
Defendant.

REPORTER'S VERBATIM REPORT OF
COURT'S ORAL DECISION

November 12, 1996

Before The Honorable Larry A. Jordan,
Judge of the Superior Court for King County,
Department Number 54

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[2] THE COURT: Thank you, counsel. Counsel, as you know, these issues have been before the Court from really the beginning. I have had numerous briefs and I did get the last brief this morning. I spent in excess of one hour reading that brief. I want you to know that I have the issues fairly clear at hand. Even though I didn't get an opportunity to read every case cited, I think the arguments that were presented on behalf of Mr. Pang

were somewhat anticipated by me, in light of the issues that have been framed from the beginning.

The oral argument demonstrated to a certain degree the issues that have been before the Court for months. It isn't that I haven't spent a lot of time thinking about this issue and I intend to give a decision now. The reason for that is that we've had this issue pending.

The Court spent a great deal of time off the bench wrestling with the issues presented. I have spent hours researching, reading cases, and actually reading information that hasn't even been cited, Law Review articles and othe treatises dealing with the [3] issues of extradition.

This is not an easy issue, certainly not an issue that one gets a lot of training in one's legal education and, of course, one's experience as a lawyer and/or judge doesn't very often lend itself to resolving these kinds of issues.

But let me start by stating that it's clear to this Court, as has been consistently argued, that under the separation of powers within Brazil the decisions concerning extradition are, as have been argued, exclusively within the jurisdiction of the Supreme Court. The Brazilian Supreme Court has, in accordance with those jurisdictional powers under its constitution, and in applying the rule of duality, which is set forth in Article I of the Treaty determined that felony murder was not an extraditable offense. They excluded the charges of first degree murder based upon the Washington felony murder statute within the grant of extradition. This decision was reaffirmed in a subsequent denial of a motion for clarification.

The issue before this Court, in my judgment, is not to reinterpret the Brazilian Supreme Court decision. It appears reasonably clear and certainly they can argue it to a certain degree as has been done, [4] but it appears to this Court reasonably clear that Brazil did not extradite for felony murder. The question is, however, what is the

legal affect of their extradition decision under the principles of international law and the Treaty?

The answer to this question depends upon, as has been argued to me this morning, the so-called rule of specialty, which is a rule which is contained in Article XXI of the Treaty. I'm not going to reread that particular provision. It's been quoted to me in large part by both parties. The state had a blow-up during argument, and I have the Treaty provision right in front of me and it's been underlined and highlighted in comments to myself.

But this particular rule, which is included in the Treaty, in the rule of speciality, has been held by the U.S. Supreme Court in its decision in the *Rauscher* case to be in essence implied in every Treaty. If you analyze that case you'll see that the particular provision similar to that in this Treaty was not even included in the treaties at issue with Great Britain. So, in essence, the Supreme Court, in analyzing what crimes the person could be charged for, implied that rule in its application.

Now the state argues that when you look at [5] Article XXI that this defendant may not be tried for offenses for which extradition is not requested. And the language only relates to, "which gave rise to the request." That's the terminology included in Article XXI. The state argues that since extradition was, in essence, requested for all charges, including the four counts of murder, that the trying and the punishment of Mr. Pang for the felony murder charges is not a violation of the Treaty. The defendant argues, on the other hand, that this provision in Article XXI, the so-called rule of specialty, prohibits and is a limitation relating to the grant of extradition; in other words, that the defendant cannot be charged for an offense not requested and for which extradition is denied or not granted.

Certainly, a literal interpretation of the language of the Treaty supports the state's position. The language of

the Supreme Court's decision in the *Rauscher* case, however, doesn't support such a narrow interpretation of the rule of specialty. It's not clear to this Court that the rule is dependent entirely upon its scope, upon the precise language of the Treaty. If it can be implied in every Treaty, as the Supreme Court did in the *Rauscher* case, a broader interpretation of its scope can similarly be implied.

[6] Arguably the actions of the Brazilian Supreme Court as relates to the extradition decisions they've entered supports a conclusion that they believe that the decision as to the scope was broader than that argued by the state; in other words, that extradition would somehow limit the power or jurisdiction of this Court to try and punish Mr. Pang for crimes for which he was not extradited.

The letter from Minister Jobim, as the state has argued, is certainly some indication of a contrary position by the Executive. It is unclear under the rules of construction to this Court what would be the proper interpretation of that language. In this Court's judgment the controlling issue relates to the issue of standing to assert the alleged violations of the rule of specialty.

Counsel have briefed, and the Court is aware, that the federal courts which have considered the issue of standing are divided on this question. There is more than one rule in this regard. All of these courts, even though divided on the precise standing issue, have determined that standing is derivative only. They've analogized treaties to contracts and indicate that a defendant who is not a party to the Treaty or the contract, like contract law, cannot [7] assert a provision or a violation of that Treaty or contract on his or her own behalf, but only can assert the right on behalf of one of the parties.

So in this instance all courts agree that Mr. Pang's standing to assert any violations of this Treaty is, on behalf of Brazil, not a right that he has independently

of the rights under the Treaty which are rights of the citizens of Brazil.

I won't cite the many cases that have been cited by the parties discussing the standing issue. I will cite to the parties a discussion in the Law Review article in 62 University of Chicago Law Review, Page 1187. I'm not citing that article as an article I agree with. I'm just citing it as authority discussing the various positions of the various federal courts, which set forth the standing principles.

Now the state argues in its brief that this Court should adopt the standing rule of those cases, which would hold that because Brazil has not objected in some way that Mr. Pang has no standing. This particular rule is, it appears, the minority rule among the federal courts. It's not the position of the 9th Circuit. Its position as to standing is set forth in *U.S. vs. Najohn*, a case in 785 fed 2d at 1420.

Now, I'm not bound by the 9th Circuit opinion [8] obviously in terms of binding precedent. I am, however, finding it to be persuasive and under that particular rule of standing the person extradited may raise whatever objection the rendering country might have. Then the question is what objection has the rendering country made in this instance? In this instance has Brazil asserted a violation or otherwise objected or has it waived any provisions of the Treaty? Those are interrelated questions.

Now, under the standing rule of the 9th Circuit, which permits a defendant to object in the same measure as the surrendering state, silence, i.e., no objection, is deemed tantamount to an objection. It's an assumption that is made.

Here, however, we don't have just silence by Brazil. The record clearly shows that Brazil, through its Executive, has had every opportunity to object and has not. That's a different situation in the Court's judgment than

those situations where a country doesn't do anything and there is simply a record of silence.

Now, Mr. Pang consistently argued that any statements by the Brazilian Executive is of no legal significance. I disagree with that proposition. Even though the extradition decisions, as I stated earlier, are exclusively within the jurisdiction of the [9] Brazilian Supreme Court, here the question is not for which crimes Mr. Pang can be extradited, the question is whether Treaty rights are asserted. The Executive was the party who entered into this Treaty on behalf of the citizens of Brazil. The Executive, as the signatore party, certainly has the jurisdiction or power to enter into extradition treaties.

So the decision before me relates to the enforcement of the Treaty not to extradition decisions. The Supreme Court of Brazil has spoken, as I said earlier. I'm not going to second-guess their decision.

The issue isn't whether Mr. Pang can be extradited for four counts of murder in addition to arson. The question is whether the country of Brazil exercises its rights under Article XXI objecting to the charging and punishment of Mr. Pang per the Treaty. As I have stated, we don't have a situation under traditional standing rules where we simple have silence. We have not only silence, but we have an Executive that has been given every opportunity to object and has not.

In addition, we have an explicit request by President Clinton, as our Executive, asking for a letter in writing, obviously for an agreement, or short of an agreement a letter of non-objection.

[10] Now, the response by Minister Jobim certainly is not an express agreement or express waiver as that term is used in law. However, his conduct and his words, in my judgment, are an implicit waiver or a consent or assent by words or conduct. By not objecting and by communicating as he did in the last paragraph and last

sentence, stating that the determination of how it best be adapted to U.S. law, it seems to this Court is tant-amount to a waiver of the provision of Article XXI of the Treaty.

I conclude and find that on this record, because of that implicit waiver, that Mr. Pang lacks standing to assert a violation of Article XXI and he may be tried for all counts, including the four counts of murder, and that this Court has jurisdiction.

Accordingly, the motion to dismiss is denied.

(Court recessed for morning.)

APPENDIX C

THE SUPREME COURT OF WASHINGTON

No. 64786-1

STATE OF WASHINGTON,
Respondent,

v.

MARTIN SHAW PANG,
Petitioner.

ORDER DENYING MOTION
FOR RECONSIDERATION

The Court having considered the Resepondent's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That the Respondent's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 15th day of October, 1997.

/s/ Durham, C.J.
DURHAM, C.J.
Chief Justice

[Filed Oct. 15, 1997]

THE SUPREME COURT OF WASHINGTON

No. 64786

STATE OF WASHINGTON,
Respondent,
v.
MARTIN SHAW PANG,
Petitioner.

ORDER CHANGING OPINION

It is hereby ordered that the typewritten opinion of the Court filed in the above cause on July 31, 1997 be changed as follows:

1. In the twelfth line from the top of page 31 [App. 32a] *, the comma after the word "ambiguous" is deleted and a period is inserted in its place. The remainder of the sentence, beginning with the word "but" in the twelfth line from the top of page 31 and ending with the word "opinion," in the fourteenth line from the top of page 31, is deleted.

2. At the bottom of page 38 [App. 40a], footnote 25 is deleted and the following footnote 25 is inserted in its place:

[25] *See* State's Answer to Motion for Discretionary Review, Exhibit G.

3. In the seventeenth line from the top of page 46 [App. 48a], the date "September 26, 1996" is deleted and the date "January 14, 1997" is inserted in its place.

* Pages in brackets reflect location in appendix.

4. The sentence beginning with the words "There was no disagreement" in the fourth line from the top of page 57 [App. 57a] is deleted. Footnote superscript 52 is moved to follow the word "law." in the fourth line from the top of page 57 [App. 57a].

5. The following sentence is added to footnote 52 after the word "Portuguese." in the fourth line from the bottom of page 57 [57a]: "See opinions of Justice Néri da Silva, Moreira Alves and Sydney Sanchez."

Dated this 15th day of October, 1997.

/s/ Durham, C.J.
DURHAM, C.J.
Chief Justice

APPROVED:

/s/ Dolliver, J.
DOLLIVER, J.

/s/ Madsen, J.
MADSEN, J.

/s/ Smith, J.
SMITH, J.

/s/ Alexander, J.
ALEXANDER, J.

/s/ Guy, J.
GUY, J.

/s/ Talmadge, J.
TALMADGE, J.

/s/ Sanders, J.
SANDERS, J.

APPENDIX D

DEPARTMENT OF STATE
OFFICE OF LANGUAGE SERVICES
Translating Division

LS No. 149163
DHS/JF
Portuguese

Summary. 1. Extradition. 2. U.S. Citizen charged, by the Superior Court of King County, Seattle, Washington, U.S.A., as the perpetrator of four acts of murder in the first degree "by committing and attempting to commit the crime of arson in the first degree and, in the course of the commission of that crime and to facilitate it [sic], as well as his immediate flight after committing it." A charge was later added, accusing the person being sought of arson in the first degree as well, a class A felony. 3. For purposes of [sic—Because?] the acts are covered under two distinct offenses, the majority of the Court decided, for purposes of the extradition, that the case is one of arson in the first degree under the law of the requesting State, corresponding in the Brazilian Penal Code to the crime of arson defined in Article 250, combined with its Paragraph 1, Section I, and with Article 258 of that same Code because of the resulting death of four persons. 4. Consequently, the decision by the majority of the Court did not hold that the situation as described was one of arson in the first degree, plus four separate first-degree murders. 5. Therefore, the Court, by majority vote, granted the requested extradition in part, for the crime of arson in the first degree, resulting in four deaths and the consequences thereof under U.S. law. However, the Court did so without the additional charge of four counts of first-degree murder. 6. The minority of the Court, as expressed in the opinion of the Rapporteur, granted the extradition under the terms of the petition by the requesting State, so that the person

being sought may be tried and judged according to the charge and its addendum, under U.S. law. It did not stipulate any reservation. 7. Lastly, the decision of the Court did not include any restriction as to the possibility of life imprisonment.

DECISION

The case files having been reviewed and the case stated and discussed, the Justices of the Federal Supreme Court, meeting in plenary session and acting by majority vote in accordance with the minutes of the judgment and the transcript thereof, grants the extradition in part, on the grounds that the charges of arson in the first degree and murder in the first degree, as described in the extradition request, correspond in Brazil to the single crime that is defined in the main part of Article 250 and in Article 258 of the Brazilian Penal Code. Therefore, they exclude from the grant of extradition the charges of murder in the first degree. Also by majority vote, the Court decided to reject the need to condition surrender of the person sought on a pledge to commute life imprisonment to a maximum of 30 years imprisonment.

Brasilia, December 18, 1996 [sic]

Sepúlveda Pertence, Chief Justice
Néri da Silvera—Rapporteur

APPENDIX E

TREATY OF EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF BRAZIL[1]

The United States of America and the United States of Brazil, desiring to make more effective the cooperation of their respective countries in the repression of crime, have resolved to conclude a treaty of extradition and for this purpose have appointed the following Plenipotentiaries:

The President of the United States of America: His Excellency John Moors Cabot, Ambassador of the United States of America to Brazil, and

The President of the United States of Brazil: His Excellency Horacio Lafer, Minister of State for External Relations,

Who, having communicated to each other their respective full powers, found to be in good and due form, agree as follows:

Article I

Each Contracting State agrees, under the conditions established by the present Treaty and each in accordance with the legal formalities in force in its own country, to deliver up, reciprocally, persons found in its territory who have been charged with or convicted of any of the crimes or offenses specified in Article II of the present Treaty and committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article IV of the present Treaty: provided that such surrender shall take place only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify

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[1] Signed on January 13, 1961, entered into force on December 17, 1964, 15 U.S.T. 2093; T.I.A.S. No. 5691; Additional Protocol to Treaty, signed on June 18, 1962, entered into force on December 17, 1964, 15 U.S.T. 2112; T.I.A.S. No. 5691.

his commitment for trial if the crime or offense had been there committed.

Article II

Persons shall be delivered up according to the provisions of the present Treaty for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following crimes or offenses:

1. Murder (including crimes designated as parricide, poisoning and infanticide, when provided for as separate crimes); manslaughter when voluntary.

2. Rape; abortion; carnal knowledge of (or violation of) a girl under the age specified by law in such cases in both the requesting and requested States.

3. Malicious wounding; willful assault resulting in grievous bodily harm.

4. Abduction, detention, deprivation of liberty, or enslavement of women or girls for immoral purposes.

5. Kidnapping or abduction of minors or adults for the purpose of extorting money from them or their families or any other person or persons, or for any other unlawful end.

6. Bigamy.

7. Arson.

8. The malicious and unlawful damaging of railways, trains, vessels, aircraft, bridges, vehicles, and other means of travel or of public or private buildings, or other structures, when the act committed shall endanger human life.

9. Piracy, by the law of the nations; mutiny on board of vessel or an aircraft for the purpose of rebelling against the authority of the Captain or Commander of such vessel or aircraft; or by fraud or violence taking possession of such vessel or aircraft.

10. Burglary, defined to be the breaking into or entering either in day or night time, a house, office, or other building of a government, corporation, or private person, with intent to commit a felony therein; housebreaking.

11. Robbery.

12. Forgery or the utterance of forged papers.

13. The forgery, falsification, theft or destruction of the official acts or public records of the government or public authority, including Courts of Justice, or the uttering or fraudulent use of the same.

14. The fabrication or the utterance, circulation or fraudulent use of any of the following objects: counterfeit money, whether coin or paper; counterfeit titles or coupons of public debt, created by national, state, provincial, territorial, local, or municipal governments; counterfeit bank notes or other instruments of public credit; and counterfeit seals, stamps, dies, and marks of State or public administration.

15. The introduction of instruments for the fabrication of counterfeit coins or bank notes or other paper currency as money.

16. Embezzlement by any person or persons hired, salaried or employed, to the detriment of their employers or principals.

17. Larceny.

18. Obtaining money, valuable securities or other property by false pretenses, or by threats of injury.

19. Receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained.

20. Fraud or breach of trust by a bailee, factor, trustee, executor, administrator, guardian, director or officer of any company or corporation or by anyone in any fiduciary capacity.

21. Willful non-support or willful abandonment of a minor or other dependent person when death or serious bodily injury results therefrom.

22. Perjury (including willfully false expert testimony); subornation of perjury.

23. Soliciting, receiving, or offering bribes.

24. The following offenses when committed by public officials: extortion; embezzlement.

25. Crimes or offenses against the bankruptcy laws.

26. Crimes or offenses against the laws of both countries for the suppression of slavery and slave trading.

27. Crimes or offenses against the laws relating to the traffic in, use of, or production or manufacture of, narcotic drugs or cannabis.

28. Crimes or offenses against the laws relating to the illicit manufacture of traffic in substances injurious to health, or poisonous chemicals.

29. Smuggling, defined to be the act of willfully and knowingly violating the customs laws with intent to defraud the revenue by international traffic in merchandise subject to duty.

30. Aiding the escape of a prisoner by force of arms.

31. Use of explosives so as to endanger human life or property.

32. Procuration, defined as the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in either case to gratifying the passions of another person; profiting from the prostitution of another.

33. The attempt to commit any of the above crimes or offenses, when such attempt is made a separate offense by the laws of the Contracting States.

34. Participation in any of the above crimes or offenses.

Article III

Except as otherwise provided in the present Treaty, the requested State shall extradite a person accused or convicted of any crime or offense enumerated in Article II only when both of the following conditions exist:

1. The law of the requesting State, in force when the crime or offense was committed, provides a possible penalty of deprivation of liberty for a period of more than one year; and

2. The law in force in the requested State generally provides a possible penalty of deprivation of liberty for a period of more than one year which would be applicable if the crime or offense were committed in the territory of the requested State.

Article IV

When the crime of offense has been committed outside the territorial jurisdiction of the requesting State, the request for extradition need not be honored unless the laws of the requesting State and those of the requested State authorize punishment of such crime or offense in this circumstance.

The words "territorial jurisdiction" as used in this Article and in Article I of the present Treaty mean: territory, including territorial waters, and the airspace therefor, belonging to or under the control of one of the Contracting States; and vessels and aircraft belonging to one of the Contracting States or to a citizen or corporation thereof when such vessel is on the high seas or such aircraft is over the high seas.

Article V

Extradition shall not be granted in any of the following circumstances:

1. When the requested State is competent, according to its laws, to prosecute the person whose surrender is sought for the crime or offense for which that person's extradition is requested and the requested State intends to exercise its jurisdiction.

2. When the person whose surrender is sought has already been or is at the time of the request being prosecuted in the requested State for the crime or offense for which his extradition is requested.

3. When the legal proceedings or the enforcement of the penalty for the crime or offense committed has become barred by limitation according to the laws of either the requesting State or the requested State.

4. When the person sought would have to appear, in the requesting State, before an extraordinary tribunal or court.

5. When the crime or offense for which the person's extradition is requested is purely military.

6. When the crime or offense for which the person's extradition is requested is of a political character. Nevertheless

a. The allegation by the person sought of political purpose or motive for the request for his extradition will not preclude that person's surrender if the crime or offense for which his extradition is requested is primarily an infraction of the ordinary penal law. In such case the delivery of the person being extradited will be dependent on an undertaking on the part of the requesting State that the political purpose or motive will not contribute toward making the penalty more severe.

b. Criminal acts which constitute clear manifestations of anarchism or envisage the overthrow of the bases of all political organizations will not be classed as political crimes or offenses.

c. The determination of the character of the crime or offense will fall exclusively to the authorities of the requesting State.

Article VI

When the commission of the crime or offense for which the extradition of the person is sought is punishable by death under the laws of the requesting State and the laws of the requested State do not permit this punishment, the requested State shall not be obligated to grant the extradition unless the requesting State shall not be obligated to grant the extradition unless the requesting State provides assurances satisfactory to the requested State that the death penalty will not be imposed on such person.

Article VII

There is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, subject to the appropriate laws of that State, have the power to surrender a national of that State if, in its discretion, it be deemed proper to do so.

Article VIII

The Contracting States may request, one from the other, through the channel of their respective diplomatic or consular agents, the provisional arrest of a fugitive as well as the seizure of articles relating to the crime or offense.

The request for provisional arrest shall be granted provided that the crime or offense for which the extradition of the fugitive is sought is one for which extradition shall be granted under the present Treaty and provided that the request contains:

1. A statement of the crime or offense of which the fugitive is accused or convicted;

2. A description of the person sought for the purpose of identification;

3. A statement of the probable whereabouts of the fugitive, if known; and

4. A declaration that there exist and will be forthcoming the relevant documents required by Article IX of the present Treaty.

If, within a maximum period of 60 days from the date of the provisional arrest of the fugitive in accordance with this Article, the requesting State does not present the formal request for his extradition, duly supported, the person detained will be set at liberty and a new request for his extradition will be accepted only when accompanied by the relevant documents required by Article IX of the present Treaty.

Article IX

The request for extradition shall be made through diplomatic channels or, exceptionally, in the absence of diplomatic agents, it may be made by a consular officer, and shall be supported by the following documents:

1. In the case of a person who has been convicted of the crime or offense for which his extradition is sought: a duly certified or authenticated copy of the final sentence of the competent court.

2. In the case of a person who is merely charged with the crime or offense for which his extradition is sought: a duly certified or authenticated copy of the warrant of arrest or other order of detention issued by the competent authorities of the requesting State, together with the depositions upon which such warrant or order may have been issued and such other evidence or proof as may be deemed competent in the case.

The documents specified in this Article must contain a precise statement of the criminal act of which the person sought is charged or convicted, the place and date of the

commission of the criminal act, and they must be accompanied by an authenticated copy of the texts of the applicable laws of the requesting State including the laws relating to the limitation of the legal proceedings or the enforcement of the penalty for the crime or offense for which the extradition of the person is sought, and data or records which will prove the identity of the person sought.

The documents in support of the request for extradition shall be accompanied by a duly certified translation thereof into the language of the requested State.

Article X

When the extradition of a person has been requested by more than one State, action thereon will be taken as follows:

1. If the requests deal with the same criminal act, preference will be given to the request of the State in whose territory the act was performed.

2. If the requests deal with different criminal acts, preference will be given to the request of the State in whose territory the most serious crime or offense, in the opinion of the requested State, has been committed.

3. If the requests deal with different criminal acts, but which the requested State regards as of equal gravity, the preference will be determined by the priority of the requests.

Article XI

The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the domestic law of the requested State, and the person whose extradition is desired shall have the right to use such remedies and recourses as are authorized by such law.

Article XII

If at the time the appropriate authorities of the requested State shall consider the documents submitted by the re-

questing State, as required in Article IX of the present Treaty, in support of its request for the extradition of the person sought, it shall appear that such documents do not constitute evidence sufficient to warrant extradition under the provisions of the present Treaty of the person sought, such person shall be set at liberty unless the requested State or the proper tribunal thereof shall, in conformity with its own laws, order an extension of time for the submission by the requesting State of additional evidence.

Article XIII

Extradition having been granted, the surrendering State shall communicate promptly to the requesting State that the person to be extradited is held at its disposition.

If, within 60 days counting from such communication—except when rendered impossible by *force majeure* or by some act of the person being extradited or the surrender of the person is deferred pursuant to Articles XIV or XV of the present Treaty—such person has not been delivered up and conveyed out of the jurisdiction of the requested State, the person shall be set at liberty.

Article XIV

When the person whose extradition is requested is being prosecuted or is serving a sentence in the requested State, the surrender of that person under the provisions of the present Treaty shall be deferred until the person is entitled to be set at liberty, on account of the crime or offense for which he is being prosecuted or is serving a sentence, for any of the following reasons: dismissal of the prosecution, acquittal, expiration of the term of the sentence or the term to which such sentence may have been commuted, pardon, parole, or amnesty.

Article XV

When, in the opinion of competent medical authority, duly sworn to, the person whose extradition is requested

cannot be transported from the requested State to the requesting State without serious danger to his life due to grave illness, the surrender of the person under the provisions of the present Treaty shall be deferred until such time as the danger, in the opinion of the competent medical authority, has been sufficiently mitigated.

Article XVI

The requesting State may send to the requested State one or more duly authorized agents, either to aid in the identification of the person sought or to receive his surrender and to convey him out of the territory of the requested State.

Such agents, when in the territory of the requested State, shall be subject to the applicable laws of the requested State, but the expenses which they incur shall be for the account of the State which has sent them.

Article XVII

Expenses related to the transportation of the person extradited shall be paid by the requesting State. The appropriate legal officers of the country in which the extradition proceedings take place shall, by all legal means within their power, assist the officers of the requesting State before the respective judges and magistrates. No pecuniary claim, arising out of the arrest, detention, examination and surrender of fugitives under the terms of the present Treaty, shall be made by the requested State against the requesting State other than as specified in the second paragraph of this Article and other than for the lodging, maintenance, and board of the person being extradited prior to his surrender.

The legal officers, other officers of the requested State, and the court stenographers in the requested State who shall. in usual course of their duty, give assistance and who receive no salary or compensation other than specific

fees for services performed, shall be entitled to receive from the requesting State the usual payment for such acts or services performed by them in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers.

Article XVIII

A person who, after surrender by either of the Contracting States to the other under the terms of the present Treaty, succeeds in escaping from the requesting State and takes refuge in the territory of the State which has surrendered him, or passes through it in transit, will be detained, upon simple diplomatic request, and surrendered anew, without other formalities, to the State to which his extradition was granted.

Article XIX

Transit through the territory of one of the Contracting States of a person in the custody of an agent of the other Contracting State, and surrendered to the latter by a third State, and who is not of the nationality of the country of transit, shall, subject to the provisions of the second paragraph of this Article, be permitted, independently of any judicial formalities, when requested through diplomatic channels and accompanied by the presentation in original or in authenticated copy of the document by which the State of refuge has granted the extradition. In the United States of America, the authority of the Secretary of State of the United States of America shall be first obtained.

The permission provided for in this Article may nevertheless be refused if the criminal act which has given rise to the extradition does not constitute a crime or offense enumerated in Article II of the present Treaty, or when grave reasons of public order are opposed to the transit.

Article XX

Subject to the rights of third parties, which shall be duly respected:

1. All articles, valuables, or documents which relate to the crime or offense and, at the time of the arrest, have been found in the possession of the person sought or otherwise found in the requested State shall be surrendered, with him, to the requesting State.

2. The articles and valuables which may be found in the possession of third parties and which likewise are related to the crime or offense shall also be seized but may be surrendered only after the rights with regard thereto asserted by such third parties have been determined.

Article XXI

A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request, nor may he be re-extradited by the requesting State to a third country which claims him, unless the surrendering State also agrees or unless the person extradited, having been set at liberty within the requesting State, remains voluntarily in the requesting State for more than 30 days from the date on which he was released. Upon such release, he shall be informed of the consequences to which his stay in the territory of the requesting State would subject him.

Article XXII

The present Treaty shall be ratified and the ramifications thereof shall be exchanged at Washington, as soon as possible.

The present Treaty shall enter into force one month after the date of exchange of ratification. It may be terminated at any time by either Contracting State giving

notice of termination to the other Contracting State, and the termination shall be effective six months after the date of such notice.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Portuguese languages, both equally authentic, at Rio de Janeiro, this thirteenth day of January, one thousand nine hundred sixty-one.

[SEAL] JOHN M. CABOT

[SEAL] HORACIO LAFER

Additional Protocol to the Treaty of Extradition of January 13, 1961, Between the United States of America and the United States of Brazil

The United States of America and the United States of Brazil,

Having concluded at Rio de Janiero, on January 13, 1961, a Treaty of Extradition for the purpose of making more effective the cooperation between the two countries in the repression of crime,

And desiring to make clear that their respective nationals will be subject to extradition only if the constitutional and legal provisions in force in their territories permit it,

Have resolved to sign an Additional Protocol to the aforementioned Treaty of Extradition and, to this end, have appointed the following Plenipotentiaries:

The president of the United States of America: His Excellency Lincoln Gordon, Ambassador Extraordinary and Plenipotentiary to Brazil, and

The President of the Republic of the United States of Brazil: His Excellency Francisco Clementino de San Tiango [sic] Dantas, Minister of State for External Relations,

Who, having communicated to each other their respective full powers, found to be in good and due form, agree as follows:

Article I

Article VII of the Treaty of Extradition concluded between the countries at Rio de Janeiro, on January 13, 1961, shall be interpreted as follows:

> "The Contracting Parties are not obliged by this Treaty to grant extradition of their nationals. However, if the Constitution and laws of the requested State do not prohibit it, its executive authority shall

have power to surrender a national if, in its discretion, it be deemed proper to do so."

Article II

The present Protocol shall enter into force on the same date as the Treaty of Extradition of January 13, 1961, and shall cease to be effective on the date of termination of the Treaty.

IN WITNESS HEREOF, the respective Plenipotentiaries have signed the present Additional Protocol and have fixed hereunto their seals.

DONE in duplicate, in the English and Portuguese languages, both equally authentic, at Rio de Janeiro, on this eighteenth day of June, one thousand nine hundred sixty-two.

LINCOLN GORDON

F C DE SAN TIAGO [SIC] DANTAS

[SEAL]

WHEREAS the Senate of the United States of America by their resolution of May 16, 1961, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the treaty and by thier resolution of October 22, 1963, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the additional protocol;

WHEREAS the President of the United States of America ratified the treaty on May 29, 1961 and the additional protocol on October 29, 1963, in pursuance of the advice and consent of the Senate, and the Government of the United States of Brazil has duly ratified the treaty and the additional protocol;

WHEREAS the respective instruments of ratification of the treaty and the additional protocol were duly exchanged at Washington on November 17, 1964;

AND WHEREAS it is provided in Article XXII of the treaty that the treaty shall enter into force one month after the date of exchange of ratification, and it is provided in Article II of the additional protocol that the additional protocol shall enter into force on the same date as the treaty;

NOW, THEREFORE, be it known that I, Lyndon B. Johnson, President of the United States of America, do hereby proclaim and make public the said treaty and additional protocal, to the end that the same and every article and clause thereof may be observed and fulfilled in good faith on and after December 17, 1964, one month after the day of exchange of instruments of ratification, by the United States of America and by the citizens of the United States of America and and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twentieth day of November in the year of our Lord one thousand nine hundred sixty-four and of the independence of the United States of America the one hundred eighty-ninth.

[SEAL] LYNDON B. JOHNSON

By the President:

GEORGE W. BALL
Acting Secretary of State

(2)

Supreme Court, U.S.
FILED
NOV 14 1997
CLERK

No. 97-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF WASHINGTON,
Petitioner,

v.

MARTIN SHAW PANG,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

---

RESPONDENT'S BRIEF IN OPPOSITION

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21pp

QUESTIONS PRESENTED

Fundamental to extradition law and even more basic than the Rule of Specialty is the principle that if a requested country *expressly denies* extradition on a given charge, the extraditee has standing to object to prosecution on that charge.

In this case, the United States requested Martin Pang's extradition on five counts; Brazil expressly denied extradition on four of the five counts. In holding that the State of Washington could not prosecute Martin Pang on those four counts for which extradition was denied, the Washington Supreme Court has merely given legal effect to the conditions of extradition imposed by Brazil. The questions presented are:

1. Whether a defendant has standing, under an extradition treaty, to object to prosecution on charges for which extradition was explicitly denied in the Extradition Order and for which there was no subsequent, post-extradition consent to prosecute.

2. Whether *United States v. Rauscher*, 119 U.S. 407 (1886), and basic principles of extradition law would prohibit the United States from prosecuting an extraditee on charges for which extradition and permission to prosecute were expressly requested and repeatedly denied by the extraditing country.

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IN THE

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STATE OF WASHINGTON,

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MARTIN SHAW PANG,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

---

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Martin Shaw Pang respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Washington Supreme Court's opinion in this case, 132 Wn.2d 852, 940 P.2d 1293 (1997), reproduced in Petitioner's Appendix (Pet. App.) 1a-94a, 102a-104a.

TREATY INVOLVED

The petition cites only Article XXI of the Treaty of Extradition between Brazil and the United States, as though that were the sole provision relevant to the determination of what charges Martin Pang can be prosecuted on following extradition. Article I sets forth the primary conditions under which the parties have agreed to extradite:

> Each Contracting State agrees, under the conditions established by the present Treaty and each in accordance with the legal formalities in force in its own country, to deliver up, reciprocally, persons found in its territory who have been charged with or convicted of any of the crimes or offenses specified in Article II of the present Treaty...; provided that such surrender shall take place only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his commitment for trial if the crime or offense had been there committed.

Pet. App. 107a-108a.

STATEMENT OF THE CASE

Martin Shaw Pang stands accused of setting fire to his parents' Seattle warehouse on January 5, 1995. Four firefighters who had entered the burning building died combating the fire. On May 8, 1995, the United States sent a Petition for Extradition to Brazil, where Mr. Pang had traveled in mid-February 1995. Extradition was requested on four counts of first-degree felony-murder and one count of first-degree arson. Pet. App. 6a.

In the extradition proceedings, Mr. Pang argued that the felony-murder charges were non-extraditable under the terms of the Treaty, since (a) unintentional homicide is not included in the agreement's list of extraditable offenses, and (b) dual criminality had not been established since the U.S. had presented no evidence of intent to kill, a prerequisite for murder charges under Brazilian law. Secondly, Mr. Pang asked that his extradition be conditioned on a pledge by the U.S. to honor his right to a sentencing cap of 30 years

imprisonment, a right guaranteed by Brazil's 1988 Constitution to all criminal defendants in Brazil.

On December 18, 1995, the Brazilian Supreme Court issued its Extradition Order to extradite on the arson charge, but to "exclude from the grant of extradition the charges of murder in the first degree." Pet. App. 25a. In a second vote, a different Court majority declined to impose the 30-year sentencing limit requested, ruling the U.S. was not bound to honor a Brazilian constitutional right created decades after the 1960s Treaty was ratified. Rather, U.S. courts could give Mr. Pang, if convicted of the arson, any sentence up to life imprisonment.[1] Pet. App. 25a.

The U.S. spent the next several months attempting to persuade different Brazilian officials to void their high court's ruling that the four felony-murder charges were not extraditable offenses. Pet. App. 32a-35a. In each instance, the U.S. was informed that Executive Branch officials lack authority under the Brazilian Constitution's Separation of Powers to permit the U.S. to disregard the Court Order.

First, on February 22, 1996, the U.S. formally asked Brazil's Ministry of Foreign Relations for permission to prosecute Mr. Pang on the four felony-murder charges. Pet. App. 26a. Five days later, the Brazilian Ministry officially denied the request, attaching a certified copy of the Court's Extradition Order and explaining that Brazil's Executive "does not have jurisdiction to interpret or establish limits regarding the scope of the decisions handed down by the Judicial Branch." Pet. App. 27a.

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[1] Although the death penalty was never an issue in this case, Article VI of the Treaty does bar extradition of defendants facing that sentence.

On March 1, 1996, the U.S. filed an extraordinary *Embargos de Declaração* motion in the Brazilian Supreme Court, characterizing the Extradition Order as obscure and self-contradictory. Pet. App. 27a. On March 27, 1996, Brazil's Justices unanimously denied the motion, reasserting the clarity and finality of its original decision to "exclude from the grant of extradition the charges of murder in the first degree." Pet. App. 29a-32a.

In early March 1996, U.S. Secretary of State Warren Christopher, traveling in Brazil, "personally ask[ed] the Brazilian government to extradite Martin Pang without restriction." Pet. App. 33a. In a letter dated May 21, 1996, President Clinton asked Brazil's President for leave to prosecute on the felony-murder charges. Pet. App. 40a.

Meanwhile, U.S. Justice Department officials had contacted Brazil's Minister of Justice, Nelson Jobim. On September 26, 1996, Minister Jobim responded to Attorney-General Janet Reno that Brazil's Constitution gives its Judiciary "exclusive jurisdiction" in these matters:

> Decisions granting or denying extraditions may not be appealed, and *the Executive Branch may not limit or make comments of any kind regarding the content or scope of rulings handed down by that Court, which is the highest authority of an independent branch of government. Consequently, any interpretive statement the Executive Branch might make would be unenforceable.*

Pet. App. 41a (emphasis added).

Then, in a letter dated October 29, 1996, Brazil's President responded directly to President Clinton:

> *Despite the personal interest I took in the issue,* the consideration of the alternatives at hand clearly indicated that *room for action by the Executive branch is very limited, since a decision has already been taken by the Supreme Court....* I understand [Minister Jobim's] letter provides the American government with a *broad and clear picture of the Brazilian legal position on the issue.*

Pet. App. 44a (emphasis added).

On February 21, 1997, Mr. Pang's Brazilian attorneys sent Minister Jobim a letter, placing him on notice that his letter to the U.S. Attorney-General had caused an American judge on November 12, 1996, to conclude that Brazil's Executive had implicitly granted the U.S. permission to violate the terms of the Brazilian Federal Supreme Court's Extradition Order and to prosecute Mr. Pang on the four felony-murder charges. Pet. App. 47a. Five days later, Mr. Jobim responded:

> I'd like to inform you that *at no time did I provide any type of interpretation on the content and reach of the decision passed by the Federal Supreme Court.* Thus, I ratify all the words used in said correspondence, *its only objective being to clarify* to Ms. Janet Reno, Attorney-General of the United States, some aspects of *the Brazilian Constitutional system.*

Pet. App. 48a (emphasis added).

REASONS FOR DENYING THE WRIT

Petitioner's first query seeks to characterize this case as an ideal vehicle for the resolution of a split among the federal circuits over whether an extraditee has standing to object to prosecution on charges for which extradition was not granted,

absent affirmative protest by the extraditing nation. The truth is that no U.S. federal court has ever denied an extraditee standing to challenge the prosecution of an offense in a case such as this, where extradition was specifically petitioned by the U.S. *and then expressly and repeatedly denied* by the extraditing country, both in the Extradition Order and in all subsequent communications.

Second, Petitioner urges this Court to construe the text of this particular treaty so as to allow post-extradition prosecution *on any and all charges requested in the extradition petition*—even in cases where the requested nation has expressly *denied* extradition on specific charges. Such a construction is absurd on its face, since it would render meaningless Brazil's extradition proceedings and its ruling.

Neither Question Presented raises a genuine question of law in need of clarification by this Court. Certiorari should therefore be denied.

I. SINCE THE EXTRADITING NATION EXPLICITLY AND REPEATEDLY DENIED THE UNITED STATES PERMISSION TO PROSECUTE THE EXTRADITEE ON THE FOUR CHARGES AT ISSUE, DEFENDANT CLEARLY HAS STANDING TO OBJECT TO PROSECUTION ON SAID CHARGES

A. U.S. Courts Must Enforce Any Treaty-Based Conditions Imposed by the Extraditing Nation

All the Washington Supreme Court has done in this case is to uphold one of the most elemental principles of extradition jurisprudence: that when a requested nation, pursuant to a treaty provision, *refuses* to extradite on a particular charge,

the requesting country can neither disregard[2] nor second-guess[3] that decision. As the Washington Supreme Court noted:

> We conclude without question that under the Treaty, Brazil, as the requested state, has sole authority to determine whether a particular offense is extraditable.

Pet. App. 68a.[4]

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[2] *See United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (per curium), *cert. denied*, 479 U.S. 1009 (1986) ("Because the surrender of the defendant requires the cooperation of the surrendering state, preservation of the institution of extradition requires that the petitioning state live up to whatever promises it made in order to obtain extradition."); *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2nd Cir. 1973) ("the principle [of specialty] has been extended to bar prosecution for crimes listed in the treaty but for which extradition, for whatever reason, was not granted).

[3] In *Johnson v. Browne*, 205 U.S. 309 (1907), this Court ruled that "[w]hether the crime came within the provision of the treaty was a matter for the decision of the Dominion authorities, and such decision was final by the express terms of the treaty itself." *Id.* at 316. *See also Casey v. Dep't of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1992) ("This deference is necessary to further international comity—a goal the Supreme Court has emphasized in a variety of contexts."); *McGann v. U.S. Board of Parole*, 488 F.2d 39, 40 (3rd Cir. 1973) ("[*Johnson*] precludes any review of the Jamaican court's decision as to the extraditable nature of the offense"); *Greene v. United States*, 154 F. 401, 408 (5th Cir. 1907), *cert. denied*, 207 U.S. 596 ("[The treaty provision simply emphasizes] what must, upon reason and principle, be true as to the whole—that the decision of the authorities of the government in whose jurisdiction the fugitive shall be found is necessarily final... [and] the courts of this country cannot review a decision of foreign authorities against extradition").

[4] Article XI of the U.S.-Brazil Extradition Treaty expressly provides that "[t]he determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the domestic law of the requested State." Pet. App. 115a.

In the landmark extradition case, *United States v. Rauscher*, 119 U.S. 407 (1886), this Court made clear that the U.S. could not reasonably expect its own extradition orders to be honored abroad unless U.S. courts zealously enforced as the "supreme law of the land" the extradition orders of its treaty partners. *Id.* at 419 (citing U.S. CONST., art. VI, cl. 2).

This axiomatic policy of respect for restrictions imposed by extraditing countries is rooted in "principles of international comity: to protect its own citizens in prosecutions abroad, the United States guarantees that it will honor limitations placed on prosecutions in the United States"[5]—whether or not U.S. courts agree with those limitations. The fact that there are more extraditions today than four decades ago, *see* Pet. 9, simply underscores the importance of Judiciaries everywhere enforcing good faith compliance with extradition obligations.

The Rule of Specialty is designed to prevent countries from petitioning extradition on one set of charges and then later, in bad faith, prosecuting the extraditee on a *second* set of charges not raised during the extradition proceedings, as occurred in *Rauscher*.[6] The question of law in this case,

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[5] *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995) (citing *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989)).

[6] *See Rauscher*, *supra*, 119 U.S. at 422 ("[Because] it is for a limited and defined purpose that the [extradition] transfer is made, it is impossible to conceive of the exercise of jurisdiction in such as case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.").

however, is even more basic than that: Can the U.S. request extradition on one set of charges, have its request flatly *rejected*, and then, contrary to the requested country's wishes, nevertheless prosecute the extraditee *on that same first set of rejected charges*? The answer is obviously no, and no federal court has ever suggested otherwise.

Indeed, in judging the validity of post-extradition charges, U.S. case law uniformly sets forth as the "essential" judicial task "*to determine, as best one can, whether the surrendering state would regard the prosecution as a breach*" so as "*to prevent the United States from violating international obligations.*" *See Fiocconi v. Attorney Gen.*, 462 F.2d 475, 480 (2nd Cir.), *cert. denied*, 409 U.S. 1059 (1972).[7]

If an individual extraditee is deemed to have standing under the Rule of Specialty[8] and U.S. domestic law[9] to challenge

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[7] *See also, e.g., Van Cauwenberghe v. Biard*, 486 U.S. 517, 525 (1988) ("the principle operates to ensure that the receiving state does not abuse the extradition processes of the extraditing state"); *Andonian*, 29 F.3d at 1435 ("Our concern is with ensuring that the obligations of the requesting nation are satisfied."); *United States v. Sensi*, 879 F.2d 888, 895 (D.C. Cir. 1989) (holding that "the standard" is "whether the requested state had objected or would object to prosecution"); *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir.), *cert. denied*, 492 U.S. 921 (1989) ("the objective of the rule is to insure that the treaty is faithfully observed by the contracting parties").

[8] The *Rauscher* Court characterized the Rule of Specialty as a "right conferred upon *persons* brought from a foreign country into this under [extradition] proceedings." 119 U.S. at 424 (emphasis added).

[9] As Chief Justice Rehnquist recently noted, this Court has ruled that a U.S. domestic statute, now codified as 18 U.S.C. §3192, imposes the Rule of Specialty on *every* extradition treaty to which the U.S. is a party. *Alvarez-Machain*, 504 U.S. 655, 660 (1992) (citing *Rauscher*, 119 U.S. at 423); *see also Fiocconi, supra*, 462 F.2d at 482.

charges not requested in an international extradition petition, as this Court found in *Rauscher*, then, *a fortiori,* an extraditee has standing to challenge charges requested *and denied by the requested country*. The Court made this very argument in *Johnson v. Browne*, 205 U.S. 309 (1907):

> While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense. *Especially should this be the case where the Government surrendering the person has refused to make the surrender for the other offense on the ground that such offense was not one covered by the treaty.*

Id. at 321 (emphasis added).

B. The Difficulty in This Case Has Not Been Brazil's Failure to Make Its Position Clear, But Refusal by U.S. Officials to Accept It

As the Statement of the Case above makes clear, Brazil has steadfastly held that the four felony-murder charges are not extraditable offenses under the terms of the U.S. Brazil Extradition Treaty. Brazil said no during the extradition proceedings and post-extradition when the United States continued efforts to pressure Brazilian officials into granting permission to prosecute Mr. Pang on these charges.[10]

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[10] To summarize the record, Pet. App. 23a-48a, Brazil has denied the U.S. request for permission to charge Mr. Pang with the felony-murder charges *at least six times*: Brazil's Supreme Court twice, its Ministry of Foreign

Having reviewed the relevant international communications in this case, the Washington Supreme Court found as follows:

> We conclude from the record in this case that Brazil has not expressly consented to nor implicitly or explicitly waived objection to the State of Washington charging [Mr. Pang] with murder in the first degree.

Pet. App. 54a-55a.

C. The Standing-Without-Protest Circuit Split Does Not Apply to Charges For Which Extradition Was Expressly Requested and Denied

Since Brazil has the right under the Treaty to say no to the four felony-murder charges requested in the U.S. Extradition Petition, and has in fact done so, U.S. federal law is unequivocal that Mr. Pang has standing to object to post-extradition prosecution on these charges.[11]

Had the facts been different in this case—had Brazil, for instance, been silent[12] or ambiguous[13] on whether it deemed the four felony-murder charges extraditable under the

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Affairs once, its Justice Ministry twice, and its President once.

[11] *See, e.g.*, *Najohn*, 785 F.2d at 1422 ("However, the person extradited may raise whatever objections the rendering country might have.") (citing *Rauscher*, 119 U.S. at 419).

[12] *See Fiocconi*, 462 F.2d at 477 ("no response from the Italian government has yet been received [regarding the post-extradition New York charges]").

[13] *See United States v. Khan*, 993 F.2d 1368, 1374-75 (9th Cir. 1993) (reversing and dismissing conviction on one count, because the court refused to "*infer an agreement to extradite from Pakistan's silence*").

Treaty—this case might have afforded this Court an opportunity to expand on its recent comments in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), on the standing-without-protest question.

There, Chief Justice Rehnquist pointed out that the *Rauscher* Court assumed an individual extraditee has standing to challenge U.S. violation of an extradition treaty whether or not the extraditing country protests: "[N]o importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder." 504 U.S. at 667.[14]

Still, even if this Court were to reverse its landmark *Rauscher* decision on this point, Mr. Pang would nonetheless have standing to challenge his prosecution on the felony-murder charges. Brazil has made clear that it considers these four charges non-extraditable offenses under the Treaty, and has therefore repeatedly denied the United States permission to prosecute Mr. Pang on these charges. *Cf.* Pet. 9-10. Even circuits such as the Second and Fifth, which have questioned standing in cases where new charges were added post-extradition, would by their own reasoning hold that Mr. Pang has standing to object to the four felony-murder charges at issue here. The dispositive concern of these circuits is to give effect to the intent of the extraditing country. Here, Brazil's intent is clear.[15]

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[14] The Eleventh Circuit has, based on this, declared the standing-without-protest question answered. *United States v. Puentes*, 50 F.3d 1567, 1574-75 (11th Cir.), *cert. denied*, 116 S.Ct. 341 (1995).

[15] *See, e.g., Fiocconi*, 462 F.2d at 482 (2nd Cir.) ("[Under 18 U.S.C. §3192], a person who has been extradited should not be tried for an offense which the foreign country would consider to be outside the limits of its act of extradition"); *United States v. Kaufman*, 858 F.2d 994, 1009 (5th Cir.

II. HONORING AN EXTRADITING NATION'S RESTRICTIONS IS A PRINCIPLE EVEN MORE FUNDAMENTAL THAN THE RULE OF SPECIALTY AND ONE WITHOUT WHICH NO EXTRADITION TREATY WOULD MAKE SENSE

Having first sought to deny Mr. Pang standing to object to prosecution on the barred charges, Petitioner next seeks to convince this Court that, despite Brazil's no, the U.S. is under no obligation under the terms of this particular Extradition Treaty to honor Brazil's express conditions of extradition.

To accomplish this, Petitioner narrowly focuses attention on the language of Article XXI, which bars prosecution for "any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request." Petitioner then points to the U.S. request for Mr. Pang's extradition, and notes, "The murder charges were listed in that request." Pet. 18. Thus, by definition, they "gave rise to the request." Then comes Petitioner's surprising conclusion: "the State of Washington can prosecute Pang for the four counts of murder *because those offenses were listed in the extradition request*." Pet. 14 (emphasis added). Petitioner's formula thus neatly circumvents the fact that Brazil *denied* the request for extradition on those charges.

Petitioner's sophistry would not only render meaningless the extensive extradition proceedings conducted in Brazil's highest federal court, but would also void Brazilian officials' principled subsequent refusals to grant the U.S. what it so aggressively sought: permission to prosecute Mr. Pang on the

---

1988), *reh'g denied*, 874 F.2d 242 (1989) (since there was "no basis to conclude" that the charges could offend the requested nation, "hence, this prosecution does not constitute a breach of the treaty provisions.").

four felony-murders that the Brazilian Supreme Court had ruled were non-extraditable offenses under the Treaty.

By force of logic, Petitioner's construction would also allow Brazil to disregard any extradition limitations imposed by the United States. Suppose, for instance, that Brazil petitioned the extradition of a physician on several charges, including four first-trimester abortions allegedly performed in Rio de Janeiro. Although abortion is an extraditable offense under Article II of this 1960s Treaty, *see* Pet. App. 108a, Art. II, §2, and remains a serious crime in Brazil, it has since been ruled constitutionally protected behavior in the United States. *See, e.g., Roe v. Wade*, 410 U.S. 113, *rehg. den.*, 410 U.S. 959 (1973). Were the United States to grant extradition on the other charges, but to exclude from the grant of extradition the four abortion counts on grounds that the dual criminality requirement in Article I of the Treaty had not been satisfied, the U.S. would surely expect Brazilian courts to uphold its decision and not allow post-extradition prosecution on the abortion charges. Under Petitioner's out-of-context construction of Article XXI, however, Brazil would be free to disregard the United States' Extradition Order.

At the very least it is clear that Brazil, as the other party to this international agreement, does not share Petitioner's views. Brazil's 1988 Constitution gives its highest judicial body original and exclusive jurisdiction over all extraditions. Pet. App. 27a, 41a. Had Brazil's Justices believed their determination of the extraditability of each of the five petitioned charges in this case would have no legal consequence in the U.S., they need not have wasted their time. Indeed, if Petitioner's construction were adopted, what reason would Brazil's high court have to review future U.S. petitions for extradition? More importantly, why would the Brazilian Justices *grant* any U.S. extradition petitions,

knowing that the provisions of the U.S.-Brazil Extradition Treaty were being openly disregarded in American courts?

The fact is that Article XXI is only one of several provisions in the U.S.-Brazil Extradition Treaty affording both parties the right to deny extradition for certain offenses. Indeed, the Treaty's first article requires (1) that the principle of dual criminality be met and (2) that the offense for which extradition is requested be listed among the extraditable offenses in Article II. Neither of these two primary Treaty requirements was satisfied in this case. Brazil was therefore within its Treaty rights to deny extradition on the four felony-murder charges, and the U.S. cannot now violate Brazil's ruling. In the words of the Washington Supreme Court,

> Under all the established facts in this case and the application of international law, treaty law, United States law, Washington law, and common logic, we must give good faith recognition to the lawful determination of the Federal Supreme Court of Brazil, the highest court of that sovereign democracy, that Petitioner Martin Shaw Pang was extradited only for prosecution in the State of Washington for the crime of arson in the first degree, resulting in four deaths, but not for prosecution for the four charges of murder in the first degree.

Pet. App. 71a-72a.

CONCLUSION

The Washington Supreme Court has simply enforced United States compliance with the provisions of this country's decades-old treaty with Latin America's largest sovereign democracy. Federal case law is uniform that the United States must honor whatever restrictions are imposed by an

extraditing nation. This principle of extradition law is axiomatic and should not be called into question by this Court. Brazil has said no to the four felony-murder charges requested and certainly has every right to presume that American courts will give its Treaty-based decision the good faith recognition it deserves. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 97-688

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF WASHINGTON,
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v.

MARTIN SHAW PANG,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

---

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Pang's response to the State's Petition for Certiorari reinforces the need for this Court to resolve outstanding issues concerning the application of the specialty doctrine when a defendant has been extradited from a foreign country. Pang acknowledges the federal circuit court split on the issue of when a defendant has standing to claim a violation of an extradition treaty. The record in this case exemplifies the confusion engendered by the circuit split. Consistent with the "no standing without protest" authority, Pang unsuccessfully sought a formal written protest from Brazil. The State, on the other hand, requested a waiver from Brazil in accordance with the "standing unless waiver" cases. By granting certiorari, the Court can finally resolve the split and end the confusion.

Pang does not attempt to defend the Washington Supreme Court's holding that the specialty doctrine bars prosecution on the murder counts; instead, he claims that some other, unnamed, principle is at work. But the decision below cannot be reconciled with prior decisions of this Court and the United States Courts of Appeals.

In the past several decades, international travel for ordinary citizens has become commonplace. The costs of travel have fallen dramatically, and visa requirements have been relaxed. As a consequence, it has become easier for a criminal suspect to flee to another nation, forcing prosecuting authorities to resort to extradition in order to obtain jurisdiction over a suspect. This case presents the Court with an excellent opportunity to resolve several outstanding extradition issues, issues that promise to arise more frequently in the coming years.

ARGUMENT

I. THE COURT SHOULD ACCEPT REVIEW TO RESOLVE THE CIRCUIT SPLIT OVER THE STANDING ISSUE.

Pang acknowledges that a split exists in the federal circuits concerning when an extradited defendant has standing to claim a violation of the doctrine of specialty. Brief in Opp. 5-6, 11-12. The decisions fall into two categories: (1) the "no standing without protest" approach, and (2) the "standing unless waiver" approach. Pet. 8-9. In this case, the Washington Supreme Court adopted the "standing unless waiver" approach, found that Brazil had not waived any objection, and held that Pang had standing to allege a violation of the extradition treaty. Pet. 52a-57a.

Pang argues that he has standing even under the "no standing without protest" approach, claiming that the Brazilian Federal Supreme Court's failure to include the murder counts in their extradition decision constitutes a

protest. Brief in Opp. 11-12. However, no court in this case has ever found that Brazil issued a protest. In fact, it is clear that Brazil has not and does not intend to protest the prosecution of Pang for murder.

Pang has repeatedly requested that the Brazilian Government issue a formal written protest, to no avail. In November of 1996, Pang's attorney faxed a letter to the Brazilian Ministry of Justice requesting that Brazil formally protest the King County Superior Court's decision to allow Pang to be prosecuted for murder. After receiving no response for several weeks, Pang's attorney again wrote to the Ministry requesting a formal written protest. Again, after receiving no response, Pang's attorney wrote a third time, requested a formal written protest, provided the mailing address for the Superior Court judge, and warned that they were preparing legal action in Brazil.[1] No protest was forthcoming.

Finally, in January of 1997, Pang's Brazilian attorneys wrote to Justice Minister Nelson Jobim, requesting that he respond to the letters from Pang's U.S. counsel. Instead of issuing a protest as requested, Minister Jobim wrote back to Pang's Brazilian attorneys, stating that "the criteria in judging the case" was for the "exclusive interpretation" of the courts in the United States. Pet. 48a.

To date, Brazil has not issued any protest to the United States Government, the State of Washington or the King County Superior Court. It is difficult to imagine a clearer case of no protest: Brazil was aware that Pang was to be prosecuted for murder, Pang requested that Brazil protest, and Brazil did not. Under the "no standing without protest" approach, Pang would have no standing to claim a violation of the extradition treaty.

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[1] It is also apparent from the correspondence that Pang's attorney spoke with several members of the Ministry of Justice by telephone.

This case is an excellent example of the unfortunate and practical consequences of allowing the circuit court split to continue unresolved. Both parties invested considerable resources to obtain written protests or waivers from the Brazilian Government given the conflicting decisions on the standing issue from the federal circuit courts.[2]

In light of the Ninth Circuit's position that an extradited defendant has standing unless the surrendering nation provides a waiver,[3] the United States Government prudently requested an explicit waiver from the Brazilian Government. Pet. 3-4. On the other hand, Pang repeatedly lobbied the Brazilian Government to issue a formal written protest, presumably as a result of the "no standing without protest" cases. This Court should accept review and put an end to this uncertainty.

II. PANG IMPLICITLY CONCEDES THAT THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE SPECIALTY DOCTRINE IS INCONSISTENT WITH DECISIONS OF THIS COURT AND THE UNITED STATES COURTS OF APPEALS.

The Washington Supreme Court held that the rule of specialty prohibits the State of Washington from prosecuting Pang for murder. Pet. 72a-73a. Pang does not attempt to defend this holding; instead, he argues that there is a principle "more basic" than the specialty doctrine that prohibits the State from prosecuting him. Brief in Opp. i, 8-9. By abandoning the specialty doctrine, Pang, in essence, concedes that the Washington Supreme Court's interpretation of the treaty's specialty provision cannot be reconciled with the treaty's plain language, this Court's

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[2] Pang's letter writing campaign is described above. As noted in the Petition, President Clinton became actively involved in attempting to obtain a written waiver from the Brazilian Government. Pet. 4.

[3] *United States v. Khan*, 993 F.2d 1368, 1374 (CA9 1993).

standards of treaty interpretation and numerous decisions of the United States Courts of Appeals. *See* Pet. 12-18.

Though Pang does not name the "basic" principle that prohibits the State from prosecuting him for murder, all of the cases he cites in his brief involve either the specialty doctrine or the doctrine of dual criminality. To the extent Pang suggests that it is the doctrine of dual criminality that prevents his prosecution for murder, he has confused that doctrine with the doctrine of specialty.

The doctrine of dual criminality applies prior to extradition. Parties to an extradition treaty may agree that the asylum nation may rely upon the doctrine in deciding whether a request contains extraditable offenses.[4] Dual criminality requires that the acts described in the request constitute an offense in both countries.[5] The United States-Brazil extradition treaty contains such a provision in Article III.[6]

The doctrine of specialty applies after extradition and limits the requesting nation's ability to prosecute an extradited individual for a particular offense.[7] As Pang acknowledges, it prevents the requesting nation from misleading the surrendering nation as to the reasons behind the request for extradition. *See* Brief in Opp. 8.

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[4] *Matter of Extradition of Russell*, 789 F.2d 801, 803 (CA9 1986).

[5] *See Collins v. Loisel*, 259 U.S. 309, 312 (1922); *United States v. Sensi*, 879 F.2d 888, 894 (CADC 1989). In this case, the doctrine of dual criminality was clearly satisfied because the act of committing arson, resulting in death, is a serious offense in Brazil. Pet. 24a-32a. Moreover, both arson and murder are listed as extraditable offenses in the treaty. Pet. 108a.

[6] Pang erroneously states that Article I imposes the doctrine of dual criminality. Brief of Opp. 14. In *Factor v. Laubenheimer*, 290 U.S. 276, 282-94 (1933), this Court interpreted a virtually identical treaty provision and held that it did not incorporate the doctrine of dual criminality.

[7] *United States v. Rauscher*, 119 U.S. 407, 419-20 (1886).

These two concepts are commonly joined in extradition treaties. When the treaty specifies that dual criminality is the method of determining whether an offense is extraditable and the treaty's specialty provision allows the receiving state to prosecute only those offenses for which extradition is *granted*, the specialty provision acts as an enforcement mechanism for the surrendering nation's dual criminality analysis.

These two doctrines, however, were not joined by the drafters of the United States-Brazil extradition treaty. The treaty's specialty provision does not restrict prosecution after extradition to only offenses considered extraditable by the surrendering nation. Instead, the specialty provision limits prosecution to offenses listed in the extradition *request*. Pet. 119a. As a consequence, the parties eliminated the ability of the surrendering nation to *partially* grant an extradition request.[8] Under the terms of the current treaty, Brazil and the United States have the power to grant extradition on either all or none of the offenses listed in the request.[9] Thus, once Pang was extradited, Brazil could not prevent the United States from prosecuting him for all the charges listed in the extradition request.

Pang claims that, unless his position is adopted, the entire extradition proceedings conducted in Brazil would be rendered meaningless. Brief in Opp. 13. This assertion is meritless. The extradition proceedings were nec-

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[8] Pang argues that because the Brazilian Supreme Court apparently assumed it had the power to grant partial extradition, the United States is bound by that determination. Brief in Opp. 14-15. However, it is not clear that the Brazilian Supreme Court ever considered the import of the treaty's specialty provision, and, in any event, this Court is not bound by Brazil's interpretation of the treaty. *Ex Parte Charleton*, 185 F. 880 (1911), *aff'd*, *Charleton v. Kelly*, 229 U.S. 447 (1912).

[9] Presumably, Brazil could have ensured that Pang would not be prosecuted for murder by rejecting the initial extradition request and insisting on a new request that only included the arson charge.

essary in order for Brazil to determine whether Pang should be extradited. Had the court determined that none of the crimes were extraditable or that they constituted political offenses, it could have refused extradition.

Pang, perhaps somewhat facetiously, suggests that if he is prosecuted for murder, Brazil may refuse to consider or grant future extradition requests from the United States. Brief in Opp. 14. This is not a valid reason for disregarding the plain language of the treaty. This Court has recognized that such concerns are matters for the Executive Branch and that the diplomatic approach, rather than unilateral action by a court, is best suited for resolving such issues.[10] Given Brazil's lack of response to Pang's entreaties, it appears highly unlikely that his predictions of a crisis will be realized.

Pang's efforts to find new justification for the Washington Supreme Court's decision is a clear indication of the flaws in that decision. This Court should accept review, reverse that decision and allow the State of Washington to prosecute Pang for all of the charges listed in the extradition request, including the four counts of first-degree murder.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and reverse the decision of the Washington Supreme Court.

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[10] *See United States v. Alvarez-Machain*, 504 U.S. 655, 669 n.16 (1992).

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